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SUPPLEMENT, 1907-1912

New York (City) to Charters

ASH'S ANNOTATED GREATER ^{NY}
NEW YORK CHARTER

THIRD EDITION, 1906

CONTAINING

AMENDMENTS MADE BY THE NEW YORK LEGISLATURE SUBSEQUENT TO 1906
AND INCLUDING THE YEAR 1911

WITH

ANNOTATIONS OF THE JUDICIAL DECISIONS RELATING THERETO FROM JUNE 15,
1906, TO JANUARY 1, 1912

TOGETHER WITH

APPENDIX OF AMENDMENTS TO N. Y. CITY CONSOLIDATION ACT (L. 1882,
CH. 410) STILL IN FORCE

BY

MARK ASH AND WILLIAM ASH
OF THE NEW YORK BAR

NEW YORK
BAKER, VOORHIS & CO.
1912

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PREFACE

This supplement to the third edition of Ash's Annotated Greater New York Charter, published in 1906, has been prepared in response to many calls to bring that publication down to date, in view of the many amendments made to the charter by the legislature, and decisions of the courts since June 15th, 1906.

This work pursues the same general plan followed in former editions. It contains in their proper order in the text, all the amendments made during the sessions of the legislature of 1907, 1908, 1909, 1910 and 1911, together with annotations under the various sections, of the decisions of the courts, published since the last edition, construing provisions of the charter and other statutes relating to the City of New York.

Three hundred and twenty-four sections of the charter have either been amended, repealed or added since the last publication. A number of sections have been amended several times. The amendments made since 1906 to that part of the New York City Consolidation Act (L. 1882, ch. 410) still in force, have been added in an appendix.

In 1905, two acts were passed by the legislature to provide for an additional water supply for the City of New York, which displace many of the existing provisions of the charter, and therefore these acts, as amended to and including the year 1911, have been reprinted in full with notes of decisions, in another appendix.

The annotations include cases appearing in 203 N. Y., 146 App. Div., 73 Misc., and 132 N. Y. Supp. References are also given to decisions in the New York Law Journal, not elsewhere reported.

MARK ASH,
WILLIAM ASH.

Dated, February 1st, 1912.

TABLE *

OF CHANGES EFFECTED IN THE GREATER NEW YORK CHARTER
(L. 1897, Ch. 378, as revised by L. 1901, Ch. 466), SHOWING SECTIONS
AMENDED, REPEALED AND ADDED BY THE LEGISLATURE
SUBSEQUENT TO 1906 AND INCLUDING THE YEAR 1911.

Sec. 19	1907	763	Sec. 205a (added)	1907	302
34	"	431	206, 213	1910	683
34	1909	540	221a (added)	1909	388
34	1910	553	222	1907	439
45	1907	439	229	1910	683
47	1907	168	230, p. 2, subd. 4	1907	43
47	1907	439	230, p. 9, subd. 2	1907	680
47	1908	376	230, p. 9, subd. 9	1908	65
51	1910	262	245a-245c (added)	1909	516
101	1911	644	246 (added)	1907	601
149	1910	545	246	1910	683
150	1911	607	247 (added)	1911	679
163	1907	365	261	1907	677
165-167	1911	669	270	1907	469
169	1907	439	276	1907	160
169	1908	147	284	1907	278
169	1909	377	288	1907	160
169	1910	683	290	1907	160
169	1911	456	299	1907	160
170	1910	683	316	1907	160
173	1910	683	354	1907	445
174	1907	439	383	1907	383
174, 175	1910	683	402 (added)	1911	834
180	1909	377	419	1910	554
181	1907	439	425	1907	763
182	1907	762	435	1911	712
182	1908	242	436	1907	678
182	1910	683	439	1911	675
182	1911	456	445	1911	675
186, 187	1910	683	453	1908	83
188	1910	683	471a (added)	1908	142
189 (added)	1911	224	473	1908	382
196	1911	304	475	1908	382
205	1907	439	486	1911	675
205	1909	398	518	1910	220
205	1910	683	529a (added)	1910	654
205	1911	694	534	1909	397

* This table includes references to statutes amending the sections of the Greater New York Charter more than once by the Legislature during the years 1907 to 1911, inclusive, although the text gives only the latest amendment.

Sec. 534	1911	680	Sec. 822a (added)	1910	242
539, 541	1909	397	823e (added)	1907	375
541a (added)	1909	397	823f	1907	431
547	1909	397	823g (added)	1908	381
548-558 (added)	1911	839	823h (added)	1911	660
602 (added)	1908	134	824a (added)	1907	451
607	1911	644	824a	1909	330
612	1908	135	837	1908	389
612a (added)	1908	135	876	1910	265
612b (added)	1910	681	889	1911	455
616	1908	135	892	1911	451
628 (added)	1907	134	892a (added)	1907	611
628	1908	106	892a	1911	455
629-631	1911	563	894	1911	455
633, 637	1907	675	895, 896	1911	455
659	1910	330	897	1908	64
667	1909	348	898-900	1911	455
687	1908	357	906	1911	455
688	1908	357	907	1911	455
691a (added)	1911	69	909	1908	490
693 (added)	1910	551	909, 911	1911	455
693, subds. 6, 7	1911	682	914	1908	447
693a (added)	1909	395	914	1911	455
695	1907	637	915 (repealed)	1908	447
695	1909	381	916	1908	447
698	1907	516	916	1911	455
698	1909	565	917	1908	447
698 (repealed)	1910	659	917	1911	455
707	1910	559	918, 919 (repealed)	1911	455
707 (repealed)	1910	659	920	1907	303
707a (repealed)	1910	659	920	1908	490
708 (repealed)	1910	659	933	1908	12
710, 711 (repealed)	1910	659	948	1910	546
726	1907	269	955	1910	550
726	1908	356	964	1908	490
727, 728	1911	899	970	1909	394
734	1907	277	970	1910	336
734	1907	602	973	1910	336
740	1907	547	979	1909	394
740	1911	392	980	1909	394
743 (added)	1910	544	981	1909	394
774-776, 776a, 777,			985	1909	394
777a, 777b, 778,			992	1910	548
778a, 778b, 778c			1017	1908	490
(added)	1911	899	1020, 1021	1908	490
789, subd. 10	1907	639	1022	1911	455
791	1908	354	1023	1908	490
792	1908	355	1023	1911	673
810	1907	642	1024, 1025	1908	490
816	1907	671	1025	1911	455
816	1911	304	1026, 1027	1908	490
818a (added)	1911	695	1028 (repealed)	1908	490

TABLE

vii

Sec. 1029, 1030 (renumbered 1028, 1029)	1908	490	Sec. 1390 (repealed)	1910	659
1030 (added)	1908	490	1391, 1392	1907	598
1031-1035 (repealed)	1908	490	1391-1393 (repealed)	1910	659
1031-1035 (added)	1908	490	1394	1908	377
1035	1911	65	1394, 1395 (repealed)	1910	659
1036-1047 (repealed)	1908	490	1396	1907	598
1036-1047 (added)	1908	490	1396	1909	526
1048, 1049 (repealed)	1908	490	1396, 1396a, 1397 (repealed)	1910	659
1049	1911	673	1397a (added)	1907	598
1050-1052 (renumbered 1048-1050)	1908	490	1398 (repealed)	1910	659
1053 (repealed)	1908	490	1399-1401 (repealed)	1910	659
1054 (renumbered 1051)	1908	490	1402-1404 (repealed)	1910	659
1066	1910	456	1405-1410 (repealed)	1910	659
1091	1911	902	1411 (repealed)	1910	659
1092	1907	167	1412-1417 (repealed)	1910	659
1092b (added)	1909	505	1418 (1399 renumbered) (repealed)	1910	659
1170	1909	342	1419	1909	566
1241	1911	886	1419 (repealed)	1910	659
1265 (repealed)	1910	659	1436b (added)	1909	328
1320	1907	373	1488-1494 (added)	1909	400
1322	1907	644	1488-1494 (added)	1910	547
1323a	1907	373	1503	1911	516
1352	1907	603	1539a	1910	702
1352, subd. 6 (added)	1911	678	1539a	1911	813
1355, 1357	1907	603	1541	1910	543
1360	1907	603	1542a (added)	1910	267
1362	1907	603	1543a (added)	1907	723
1362	1908	462	1553	1908	356
1373	1907	603	1553	1909	398
1383	1907	603	1567 (added)	1909	559
			1567	1910	679

TABLE

OF SECTIONS OF THE NEW YORK CITY CONSOLIDATION ACT (L. 1882, Ch. 410) AMENDED OR REPEALED BY THE LEGISLATURE SUBSEQUENT TO 1906 TO AND INCLUDING THE YEAR 1911.

Sec. 1108	repealed	L. 1909, ch. 35, § 800
1109	"	" " " " "
1503	amended	L. 1911, ch. 516
1515	repealed	L. 1907, ch. 412
1516	"	" " " " "
1517	"	" " " " "
1519	"	" " " " "
1521	"	" " " " "
1522	"	" " " " "
1523	"	" " " " "
1525	"	" " " " "
1537	amended	L. 1909, ch. 542
1638	"	L. 1910, ch. 549
1639	"	" " " " "
1641	"	" " " " "
1645	"	" " " " "
1648	"	" " " " "
1649	"	L. 1911, ch. 85
1776	"	L. 1908, ch. 84
Secs. 1839-1844	repealed	L. 1909, ch. 22, § 570
1846-1848	"	" " " " "
1850-1861	"	" " " " "
1864-1866	"	" " " " "
1868-1929 and 1931	"	" " " " "
Sec. 2070	amended	L. 1909, ch. 353
2071	"	" " " " "
2074	"	" " " " "
2075	"	" " " " "
2076	"	" " " " "
2077	"	" " " " "
2082	"	" " " " "
2083	"	" " " " "
2125	"	L. 1909, ch. 581

SUPPLEMENT 1907-1912
TO
ASH'S ANNOTATED GREATER NEW
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(THIRD EDITION, 1906)

CONTAINING

AMENDMENTS MADE BY THE NEW YORK LEGISLATURE SUBSE-
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WITH

JUDICIAL DECISIONS RELATING THERETO FROM JUNE 15, 1906
TO JANUARY 1, 1912

**§ 10. Expenses of the city for the years 1898 and 1905; fixing
of salaries by Board of Estimate. (See 3d Ed., p. 9.)**

Effect of general reduction of salaries.

~~The provisions of L. 1902, ch. 436, conferred upon the board of estimate.~~

**Board of aldermen; president; quorum; salaries; vacancies,
how filled.**

§ 18. The board of aldermen shall consist of members elected one from each of the aldermanic districts hereinafter provided for and of the president of the board of aldermen and of the presidents of the several boroughs. The president of the board of aldermen shall be chosen on a general ticket by the qualified voters of the city at the same time and for the same term as herein prescribed for the mayor. He shall be known as the president of the board of aldermen, and shall, except as herein provided, possess all the rights, privileges and powers, and perform the duties which on December thirty-first, eighteen hundred and ninety-seven, were conferred or imposed by law upon the president of the board of aldermen or the mayor, aldermen and commonalty of the city of New York. The aldermen shall be elected at the general election in the year nineteen hundred and one, and every two years thereafter. The term of office of each member of the board of aldermen shall commence on the first day of January after his election, and shall continue for two years thereafter. The

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**§ 10. Expenses of the city for the years 1898 and 1905; fixing
of salaries by Board of Estimate. (See 3d Ed., p. 9.)**

Effect of general reduction of salaries.

~~The provisions of L. 1902, ch. 436, conferred upon the board of estimate~~

phrase, all the members of the board of aldermen, wherever used in this act, shall be taken and held to mean all the members of said board, including the president of the board of aldermen and the presidents of the several boroughs. The phrase, members elected to the board of aldermen, wherever used in this act, shall be taken and held to mean all the members of said board, except the president of the board of aldermen and the presidents of the several boroughs. Any vacancy which may occur among the members elected to the board of aldermen shall be filled by election by a majority of all the members elected thereto, of a person who must be of the same political party as the member whose place has become vacant; and the person so elected to fill any such vacancy shall serve for the unexpired portion of the term. A majority of all the members of the board of aldermen shall constitute a quorum. The salary of the president of the board shall be five thousand dollars a year, the salary of the vice-chairman of the board shall be four thousand dollars a year, the salary of the chairman of the committee on finance shall be four thousand dollars a year and the salaries of the aldermen shall be two thousand dollars a year. (*As amended by L. 1912, ch. 131.*)

See L. 1912, ch 131, § 2.

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**§ 10. Expenses of the city for the years 1898 and 1905; fixing
of salaries by Board of Estimate. (See 3d Ed., p. 9.)**

Effect of general reduction of salaries.

The provisions of L. 1902, ch. 436, conferred upon the board of estimate within the period prescribed by the statute, the unlimited power to fix the salaries of the clerks of the city department without regard to the provisions of the Civil Service Law and § 1543, *post*. The fact, therefore, that the salary of a clerk was reduced to such an extent that his position fell to a lower grade in the civil service, did not constitute a removal within § 1543, *post*, and he was not entitled to recover from the city the amount his salary was reduced. *Walters v. City of New York*, 190 N. Y. 375, *aff'd* 119 App. Div. 464, 105 N. Y. Supp. 950.

**§ 17. Legislative power of city vested in Board of Aldermen.
(See 3d Ed., p. 13.)**

Board; continuous body.

The common council of the city of New York is a continuous body and may complete business in one year which had its inception in a previous year. *Matter of Mayor, etc., of New York*, 193 N. Y. 503, *rev'd* 121 App. Div. 702, 106 N. Y. Supp. 503.

Aldermanic districts; division of city into; boundaries of.

(See 3d Ed., p. 14.)

§ 19. The city of New York is hereby divided into seventy-three aldermanic districts as follows:

The first aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and Clarkson street and running thence along Clarkson street to Carmine street, to Sixth avenue, to West Third street, to Broadway, to Worth street, to Park Row, to North William street, thence along North William street and William street to Beaver street, to Broadway, thence along Broadway and Whitehall street to the East river, thence around the southern end of Manhattan island and along the East river and the Hudson or North river to the place of beginning; and also Governor's, Bedloe's and Ellis islands.

The second aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and Whitehall street, thence along Whitehall street and Broadway to Beaver street, to William street, thence along William street and North William street to Park Row, to East Broadway, to Catherine street, to Henry street, to Clinton street, to Grand street, to Gouverneur street, to Madison street, to Montgomery street, to Cherry street, to Clinton street, to the East river, thence along the East river to the place of beginning.

The third aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Broadway and Worth street, thence along Broadway to Great Jones street, to Lafayette street, to Astor place, to Fourth avenue, to East Fourteenth street, to Second avenue, to Chrystie street, to Division street, to Catherine street, to East Broadway, to Park Row, to Worth street, thence along Worth street to the place of beginning.

The fourth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and Clinton street, thence along Clinton street, to Cherry street, to Montgomery street, to Madison street, to Gouverneur street, to Grand street, to Clinton street, to Stanton street, to the East river, and thence along the East river to the place of beginning.

The fifth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and Clarkson street, thence along Clarkson street to Carmine street, to Sixth avenue, to West Washington place, to West Fourth street, to Christopher street, to Bleecker street, to Eighth avenue, to West Fourteenth street, to Seventh avenue, to West Eighteenth street, to Ninth avenue, to West Nineteenth street,

to Tenth avenue, to West Eighteenth street, to Hudson or North river, thence along the Hudson or North river to the place of beginning.

The sixth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and Stanton street, thence along Stanton street to Norfolk street, to East Houston street, to Avenue A, to Second street, to Avenue B, to East Tenth street, to Avenue D, to East Eighth street, to East river, thence along the East river to the place of beginning.

The seventh aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and West Eighteenth street, thence along West Eighteenth street to Tenth avenue, to West Nineteenth street, to Ninth avenue, to West Eighteenth street, to Seventh avenue, to West Twenty-second street to Eighth avenue, to West Twenty-fifth street, to Seventh avenue, to West Thirty-first street, to Ninth avenue, to West Thirty-second street, to Tenth avenue, to West Thirtieth street, to the Hudson river, thence along the Hudson or North river to the place of beginning.

The eighth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the junction of Catherine and Henry streets, and running thence along Catherine street to Division street, to Chrystie street, to Stanton street, to Clinton street, to Henry street, and thence along Henry street to the place of beginning.

The ninth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and West Forty-fourth street, and running thence along West Forty-fourth street to Eleventh avenue, to West Forty-third street, to Eighth avenue, to West Thirty-eighth street, to Seventh avenue, to West Thirty-first street, to Ninth avenue, to West Thirty-second street, to Tenth avenue, to West Thirtieth street, to the Hudson or North river, and thence along the Hudson or North river to the place of beginning.

The tenth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the junction of Stanton and Chrystie streets, and running thence along Chrystie street to Second avenue, to East Fourteenth street, to Avenue A, to East Tenth street, to Avenue B, to Second street, to Avenue A, to East Houston street, to Norfolk street, to Stanton street, and thence along Stanton street to the place of beginning.

The eleventh aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning

at the Hudson or North river and West Fifty-second street, and running thence along West Fifty-second street to Eleventh avenue, to West Fifty-first street, to Tenth avenue, to West Fifty-second street, to Eighth avenue, to West Forty-third street, to Eleventh avenue, to West Forty-fourth street, to the Hudson or North river, and thence along the Hudson or North river to the place of beginning.

The twelfth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and East Eighth street, and running thence along East Eighth street to Avenue D, to East Tenth street, to Avenue A, to East Fourteenth street, to Irving place, to East Fifteenth street, to Third avenue, to East Twenty-third street, to Second avenue, to East Twenty-fourth street, to First avenue, to East Twenty-third street, to the East river, and thence along the East river to the place of beginning.

The thirteenth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and West Sixty-seventh street, and running thence along West Sixty-seventh street to Amsterdam avenue, to West Sixty-fourth street, to Columbus or Ninth avenue, to West Fifty-seventh street, to Eighth avenue, to West Fifty-second street, to Tenth avenue, to West Fifty-first street, to Eleventh avenue, to West Fifty-second street, to the Hudson or North river, and thence along the Hudson or North river to the place of beginning.

The fourteenth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and East Twenty-third street, and running thence along East Twenty-third street to First avenue, to East Twenty-fourth street, to Second avenue, to East Twenty-third street, to Lexington avenue, to East Thirty-fourth street, to Third avenue, to East Fortieth street, to Lexington avenue, to East Forty-second street, to Prospect place, to East Forty-third street, to the East river, and thence along the East River to the place of beginning.

The fifteenth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and West Ninety-first street, and running thence along West Ninety-first street to Broadway, to West Ninety-fourth street, to Columbus avenue, to West Eighty-third street, to Central Park west, to West Sixty-seventh street, to Columbus avenue, to West Sixty-fourth street, to Amsterdam avenue, to West Sixty-seventh street, to the Hudson or North river, and thence along the Hudson or North river to the place of beginning.

The sixteenth aldermanic district shall consist of that portion of

the county of New York within and bounded by a line beginning at the East river and East Forty-third street, and running thence along East Forty-third street to Prospect place, to East Forty-second street, to Lexington avenue, to East Fifty-sixth street, to the East river, and thence along the East river to the place of beginning, and also Blackwell's island.

The seventeenth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and West One Hundred and First street, running thence along West One Hundred and First street, to Amsterdam avenue, to West One Hundred and Sixth street, to Columbus avenue, to West One Hundred and Seventh street, to Central Park west, to West Eighty-third street, to Columbus avenue, to West Ninety-fourth street to Broadway, to West Ninety-first street, and thence along West Ninety-first street to the Hudson or North river and thence along the Hudson or North river to the place of beginning.

The eighteenth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and East Fifty-sixth street, and running thence along East Fifty-sixth street to Third avenue, to East Sixty-ninth street, to Lexington avenue, to East Seventieth street, to Third avenue, to East Seventy-third street, to Second avenue, to East Seventy-fourth street, to First avenue, to East Seventy-third street, to the East river, and thence along the East river to the place of beginning.

The nineteenth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and West One Hundred and Thirty-third street, and running thence along West One Hundred and Thirty-third street to Amsterdam avenue, to West One Hundred and Thirtieth street, to Convent avenue, to Morningside avenue, to West One Hundred and Twentieth street, to Manhattan avenue, to West One Hundred and Eighteenth street, to Saint Nicholas avenue, to West One Hundred and Seventeenth street, to Seventh avenue, to West One Hundred and Tenth street, to Fifth avenue, to Ninety-seventh street, transverse road, to Central park west, to West One Hundred and Seventh street, to Columbus avenue, to West One Hundred and Sixth street, to Amsterdam avenue, to West One Hundred and First street, to the Hudson or North river, and thence along the Hudson or North river to the place of beginning.

The twentieth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and East Seventy-third street, and running thence

along East Seventy-third street to First avenue, to East Seventy-fourth street, to Second avenue, to East Seventy-third street, to Third avenue, to East Seventy-fourth street, to Lexington avenue, to East Eighty-fourth street, to Third avenue, to East Eighty-third street, to Second avenue, to East Eighty-second street, to the East river, and thence along the East river to the place of beginning.

The twenty-first aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson or North river and West One Hundred and Forty-first street, and running thence along West One Hundred and Forty-first street to Seventh avenue, to West One Hundred and Thirty-sixth street, to Lenox avenue, to West One Hundred and Thirty-fifth street, to Fifth avenue, to West One Hundred and Twenty-seventh street, to Eighth avenue, to West One Hundred and Twenty-third street, to Morningside avenue east, to Convent avenue, to West One Hundred and Thirtieth street, to Amsterdam avenue, to West One Hundred and Thirty-third street, to the Hudson or North river, and thence along the Hudson or North river to the place of beginning.

The twenty-second aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and East Eighty-second street, running thence along East Eighty-second street to Second avenue, to East Eighty-third street, to Third avenue, to East Eighty-fourth street, to Lexington avenue to East Eighty-eighth street, to Second avenue, to East Ninety-first street, to First avenue, to East Ninety-second street, to the East river, and thence along the East river to the place of beginning.

The twenty-third aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson river and West One Hundred and Forty-eighth street, to Saint Nicholas avenue, to West One Hundred and Fiftieth street, to Edgecomb avenue, to Saint Nicholas place, to the Harlem river drive known as the Speedway, to the Harlem river, to Spuyten Duyvil creek, to the Hudson river to the place of beginning.

The twenty-fourth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Hudson river and West One Hundred and Forty-eighth street, to Saint Nicholas avenue, to West One Hundred and Fiftieth street, to Edgecomb avenue, to Saint Nicholas place, to the Harlem river drive known as the Speedway, to the Harlem river, to Lenox avenue, to West One Hundred and Thirty-sixth street, to Seventh avenue, to West One Hundred and Forty-first street, to the Hudson river, to the place of beginning.

The twenty-fifth aldermanic district shall consist of that portion

of the county of New York within and bounded by a line beginning at the East river and East Ninety-second street, and running thence along East Ninety-second street to First avenue, to East Ninety-first street, to Second avenue, to East Eighty-eighth street, to Lexington avenue, to East Ninety-first street, to Third avenue, to East Ninety-ninth street, to Lexington avenue, to East One Hundredth street, to Park avenue, to East One Hundred and Fifth street, to Lexington avenue, to East One Hundred and Sixth street to Third avenue, to East One Hundred and Fifth street, to Second avenue, to East One Hundred and Sixth street, to the East river, and thence along the East river to the place of beginning.

The twenty-sixth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Seventh avenue and West Twenty-eighth street, and running thence along West Twenty-eighth street to Sixth avenue, to West Twenty-ninth street, to Fifth avenue, to East Thirtieth street, to Fourth avenue, to East Thirty-first street, to Lexington avenue, to East Twenty-third street, to Third avenue, to East Fifteenth street, to Irving place, to East Fourteenth street, to Fourth avenue, to Astor place, to Lafayette street, to Great Jones street, thence along Great Jones street and West Third street to Sixth avenue, to West Washington place, to West Fourth street, to Christopher street, to Bleecker street, to Eighth avenue, to West Fourteenth street, to Seventh avenue, to West Twenty-second street, to Eighth avenue, to West Twenty-fifth street, to Seventh avenue, to West Twenty-eighth street, to the place of beginning.

The twenty-seventh aldermanic district shall consist of that portion of the county of New York beginning at East Ninety-first street and Lexington avenue, running thence along East Ninety-first street to Third avenue, to East Ninety-ninth street, to Lexington avenue, to East One Hundredth street, to Park avenue, to East One Hundred and Fifth street, to Lexington avenue, to East One Hundred and Eighth street, to Park avenue, to East One Hundred and Twentieth street, to Fifth avenue, to East Ninety-sixth street, to Lexington avenue, and thence along Lexington avenue to the place of beginning.

The twenty-eighth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Eighth avenue and West Fifty-seventh street, and running thence along West and East Fifty-seventh street to Park avenue, to East Fifty-fifth street, to Lexington avenue, to East Fortieth street, to Third avenue, to East Thirty-fourth street, to Lexington avenue, to East Thirty-first street, to Fourth avenue, to East Thirtieth street, to Fifth avenue, to West Twenty-ninth street, to Sixth avenue, to

West Twenty-eighth street, to Seventh avenue, to West Thirty-eighth street, to Eighth avenue, and thence along Eighth avenue to the place of beginning.

The twenty-ninth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the East river and East One Hundred and Sixth street, and running thence along East One Hundred and Sixth street to Second avenue; to East One Hundred and Fifth street, to Third avenue to East One Hundred and Sixth street, to Lexington avenue, to East One Hundred and Eighth street, to Park Avenue, to East One Hundred and Nineteenth street, to Third avenue, to East One Hundred and Seventeenth street to Second avenue, to East One Hundred and Fifteenth street, to Pleasant avenue, to East One Hundred and Sixteenth street to the East river, and thence along the East river to the place of beginning; and also Ward's and Randall's islands.

The thirtieth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Central Park west and Ninety-seventh street transverse road, and running thence along Ninety-seventh* street transverse road to Fifth avenue, to East Ninety-sixth street, to Lexington avenue, to East Seventy-fourth street, to Third avenue, to East Seventieth street, to Lexington avenue, to East Sixty-ninth street, to Third avenue, to East Fifty-sixth street, to Lexington avenue, to East Fifty-fifth street to Park avenue, to East Fifty-seventh street, to West Fifty-seventh street, to Ninth or Columbus avenue, to West Sixty-seventh street, to Central Park west, and thence along Central Park west to the place of beginning.

The thirty-first aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Lenox avenue and West One Hundred and Thirty-fifth street, to Fifth avenue, to East One Hundred and Twenty-ninth street, to Madison avenue, to East One Hundred and Twentieth street, to Park avenue, to East One Hundred and Nineteenth street, to Lexington avenue, to the Harlem river, to Lenox avenue, to the place of beginning.

The thirty-second aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Lexington avenue and East One Hundred and Nineteenth street, to Third avenue, to East One Hundred and Seventeenth street, to Second avenue, to East One Hundred and Fifteenth street, to Pleasant avenue, to East One Hundred and Sixteenth street, to the East river, to the Harlem river, to Lexington avenue, to the place of beginning.

* So in the original.

The thirty-third aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Morningside avenue east, and West One Hundred and Twenty-third street, and running thence along West One Hundred and Twenty-third street to Eighth avenue, to West One Hundred and Twenty-seventh street, to Fifth avenue, to East One Hundred and Twenty-ninth street, to Madison avenue, to East One Hundred and Twentieth street, to Fifth avenue, to West One Hundred and Tenth street, to Seventh avenue, to West One Hundred and Seventeenth street, to Saint Nicholas avenue, to West One Hundred and Eighteenth street, to Manhattan avenue, to West One Hundred and Twentieth street, to Morningside avenue east, and thence running along Morningside avenue east to the place of beginning.

The thirty-fourth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Harlem river and East One Hundred and Forty-ninth street, and running thence along East One Hundred and Forty-ninth street to Park avenue, to East One Hundred and Forty-sixth street, to Third avenue, to East One Hundred and Forty-eighth street, to Saint Ann's avenue, to East One Hundred and Forty-ninth street, to Prospect avenue, to Westchester avenue, to the Bronx river, to Long Island sound, thence along the Long Island sound, Bronx kills and the Harlem river to the place of beginning; and also the islands of Long Island sound adjacent thereto within the county of New York.

That portion of the county of New York lying east of the Bronx river and designated in section four hundred and twenty-five of this act as Chester, is hereby divided into two aldermanic districts as follows:

That portion of said Chester which is bounded on the north by the New York city lines; on the south by the old Boston post road from the Bronx river to Fordham and Pelham avenue (Bronx and Pelham parkway) to Westchester creek; on the west, by the Bronx river from the old Boston post road to the New York city line; on the east by Westchester creek, Givan's creek and Hutchinson's river to the New York city line, formerly known as parts of the former towns of Eastchester and Westchester of the county of Westchester, shall constitute the thirty-fifth aldermanic district.

That portion of said Chester which is bounded on the north by the old Boston road from the Bronx river to Fordham and Pelham avenue (Bronx and Pelham parkway) to Westchester creek, to Givan's creek, to Hutchinson's river, to the New York city line, to Long Island sound; on the south, by Long Island sound; on the west, by the

Bronx river, from the old Boston post road to Long Island sound; on the east, by Long Island sound, including the islands which lie within the city of New York belonging to the former town of Pelham, and which parts were formerly known as the towns of Westchester and Pelham of the county of Westchester, shall constitute the thirty-sixth aldermanic district.

The thirty-seventh aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at East One Hundred and Forty-ninth street and Mott avenue, and running thence along Mott avenue to East One Hundred and Sixty-first street, to Morris avenue to East One Hundred and Sixty-second street, to Park avenue, to East One Hundred and Sixty-fifth street, to Third avenue, to Franklin avenue, to East One Hundred and Sixty-sixth street, to Boston road, to Cauldwell avenue, to East One Hundred and Sixty-third street, to Eagle avenue, to East One Hundred and Sixty-first street, to Cauldwell avenue, to East One Hundred and Fifty-eighth street, to Westchester avenue, to Prospect avenue, to East One Hundred and Forty-ninth street, to Saint Ann's avenue, to East One Hundred and Forty-eighth street, to Third avenue, to East One Hundred and Forty-sixth street, to Park avenue, to East One Hundred and Forty-ninth street; thence along East One Hundred and Forty-ninth street to the place of beginning.

The thirty-eighth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at Third avenue and East One Hundred and Sixty-fifth street, and running thence along Third avenue to East One Hundred and Seventy-fourth street, to Park avenue, to East One Hundred and Eighty-fourth street, to Hoffman street, to Pelham avenue, to the Bronx river, to Westchester avenue, to East One Hundred and Fifty-eighth street, to Cauldwell avenue, to East One Hundred and Sixty-first street, to Eagle avenue, to East One Hundred and Sixty-third street, to Cauldwell avenue, to Boston road, to East One Hundred and Sixty-sixth street, to Franklin avenue, to Third avenue, and thence along Third avenue to the place of beginning.

The thirty-ninth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Harlem river and East One Hundred and Forty-ninth street to Mott avenue, to Grand boulevard and concourse, to East One Hundred and Seventieth street, to Teller avenue, to Morris avenue, to Belmont street, to Clay avenue, to East One Hundred and Seventy-third street, to Anthony avenue, to Grand boulevard and concourse, to East One Hundred and Eighty-fourth street, to Marion avenue, to East One Hundred and Eighty-seventh street, to Hoffman street,

to Pelham avenue, to Southern boulevard, to East Two Hundredth street, to Jerome avenue, to Fordham road, to the Harlem river, to the place of beginning.

The fortieth aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at grand boulevard and concourse and East One Hundred and Sixty-first street, to Morris avenue, to East One Hundred and Sixty-second street, to Park avenue, to East One Hundred and Sixty-fifth street, to Third avenue, to East One Hundred and Seventy-fourth street, to Park avenue, to East One Hundred and Eighty-fourth street, to Hoffman street, to East One Hundred and Eighty-seventh street, to Marion avenue, to East One Hundred and Eighty-fourth street, to Grand boulevard and concourse, to Anthony avenue, to East One Hundred and Seventy-third street, to Clay avenue, to Belmont street, to Morris avenue, to Teller avenue, to East One Hundred and Seventieth street, to Grand boulevard and concourse, to the place of beginning.

The forty-first aldermanic district shall consist of that portion of the county of New York within and bounded by a line beginning at the Harlem river and Fordham road, to Jerome avenue, to East Two Hundredth street, to the Southern boulevard, to Pelham avenue, to the Bronx river, to the New York city line, to the Hudson river, to Spuyten Duyvil creek, to the Harlem river, to the place of beginning.

The forty-second aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the East river and Fulton street, running thence along Fulton street to Columbia Heights, to Middagh street, to Fulton street, to Concord street, to Liberty street, to Fulton street, to Myrtle avenue, to Pearl street, to Willoughby street, to Lawrence street, to Johnson street, to Bridge street, to Tillary street, to Duffield street, to Navy street, to Myrtle avenue, to Raymond street, to Bolivar street, to Saint Edwards street, to Willoughby street, to Raymond street, to Lafayette street, to Navy street, to Rockwell place, to Fulton street, to Hudson avenue, to Flatbush avenue, to Fourth avenue, to Bergen street, to Court street, to Amity street, to Clinton street, to Baltic street, to Warren place, to Warren street, to Henry street, to Congress street, to Hicks street, to State street, to Furman street, to Atlantic avenue, to the East river, and thence to the place of beginning.

The forty-third aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the East river and Fulton street, running thence along Fulton street to Columbia Heights, to Middagh street, to Fulton street, to Concord

street, to Liberty street, to Fulton street, to Myrtle avenue to Pearl street, to Willoughby street, to Lawrence street, to Johnson street, to Bridge street, to Tillary street, to Duffield street, to Johnson street, to Navy street, to Myrtle avenue, to Raymond street, to Bolivar street, to Saint Edwards street, to Willoughby street, to Raymond street, to Lafayette street, to Navy street, to DeKalb avenue, to Washington Park, to Myrtle avenue, to Carlton avenue, to Park avenue, to Hall street, to Flushing avenue, to Washington avenue, and running thence along Washington avenue to the Wallabout canal, to the Wallabout channel, to Wallabout bay, East river, and thence to the place of beginning.

The forty-fourth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the East river and Atlantic avenue, and running thence to Furman street, to State street, to Hicks street, to Congress street, to Henry street, to Warren street, to Warren place, to Baltic street, to Clinton street, to Amity street, to Court street, to Third place, to Clinton street, to Huntington street, to Henry street, to Mills street, to Columbia street, to Gowanus bay, and thence around the westerly side along the waters of Gowanus bay, Buttermilk channel and the East river, to the place of beginning.

The forty-fifth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the Wallabout canal and running thence along Washington avenue, to Flushing avenue, to Hall street, to Park avenue, to Skillman street, to Willoughby avenue, to Bedford avenue, to Lafayette avenue to Marcy avenue, to Kosciuszko street, to Nostrand avenue, to Flushing avenue, to Harrison avenue, to Hooper street, to Broadway, to Rodney street, to South First street, to Marcy avenue, to South Second street, to Havemeyer street, to Broadway, to South Sixth street, to Berry street, to Broadway, to the East river, to Wallabout bay, to Wallabout channel, to Wallabout canal, to the place of beginning.

The forty-sixth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Lewis avenue and Lafayette avenue and running thence along Lewis avenue to McDonough street, to Tompkins avenue, to Fulton street, to Patchen avenue, to Sumpter street, to Howard avenue, to Marion street, to Rockaway avenue, to Broadway, to Van Buren street, to Reid avenue, to Lafayette avenue, and thence along Lafayette avenue to the place of beginning.

The forty-seventh aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Broadway and Van Buren street and running

thence along Van Buren street to Reid avenue, to Lafayette avenue, to Marcy avenue, to Kosciusko street, to Nostrand avenue, to Flushing avenue, to Broadway, and thence along Broadway to the place of beginning.

The forty-eighth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at Gowanus bay and Columbia street, and running thence along Columbia street to Mills street, to Henry street, to Huntington street, to Clinton street, to Nelson street, to Court street, to Huntington street, to Smith street, to Ninth street, to Second avenue, to Eighth street, to Fourth avenue, to Prospect avenue, to Eleventh avenue, to Terrace place, to Gravesend avenue, to Fort Hamilton parkway, to Thirty-seventh street, to Seventh avenue, to Forty-eighth street, to Fifth avenue, to Thirty-seventh street, to Fourth avenue, to Thirty-ninth street, and thence along Thirty-ninth street to the waters of Gowanus bay, and thence to the place of beginning.

The forty-ninth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Nelson street and Clinton street, and running thence along Clinton street to Third place, to Court street, to Bergen street, to Fourth avenue, to Wyckoff street, to Saint Mark's place, to Fifth avenue, to Garfield place, to Fourth avenue to Eighth street, to Second avenue, to Ninth street, to Smith street, to Huntington street, to Court street, to Nelson street, and thence to the place of beginning.

The fiftieth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at Gowanus bay and Thirty-ninth street and running thence along Thirty-ninth street to Fourth avenue, to Thirty-seventh street, to Fifth avenue, to Forty-eighth street, to Seventh avenue, to Thirty-seventh street, to Tenth avenue, to Thirty-ninth street, to Twelfth avenue, to Fortieth street, to Thirteenth avenue, to Fifty-eighth street, to Twelfth avenue, to Sixtieth street, to Thirteenth avenue, to Seventy-ninth street, to Fourteenth avenue, to Benson avenue, to Bay Seventh street, to Cropsey avenue, to Bay Eighth street, to Gravesend bay, and thence along the waters of Gravesend bay, the Narrows and Gowanus bay to the place of beginning.

The fifty-first aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Prospect place and Fifth avenue, and thence along Fifth avenue to Saint Mark's avenue, to Saint Mark's place, to Fourth avenue, to Flatbush avenue, to Fulton street, to Rockwell place, to DeKalb avenue, to Washington park, to Myrtle avenue, to Carlton avenue, to Park avenue, to Hall street, to Willoughby avenue, to

Waverly avenue, to Atlantic avenue, to Saint James place, to Lefferts place, to Grand avenue, to Pacific street, to Classon avenue, to Saint Mark's avenue, to Underhill avenue, to Prospect place, to Grand avenue, to Washington avenue, to Sterling place, to Underhill avenue, to Degraw street, to Washington avenue, and thence along the easterly and southerly side of the Institute park to Flatbush avenue, thence along Flatbush avenue, to the Prospect park plaza, to Prospect park west, to President street, to Seventh avenue, to Lincoln place, to Sixth avenue, to Prospect place, and thence along Prospect place to the place of beginning.

The fifty-second aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Hall street and Park avenue and thence along Park avenue to Skillman street, to Willoughby avenue, to Bedford avenue, to Carroll street, to Franklin avenue, to Montgomery street, to Washington avenue, to Degraw street, to Underhill avenue, to Sterling place, to Washington avenue, to Grand avenue, to Prospect place, to Underhill avenue, to Saint Mark's avenue, to Classon avenue, to Pacific street, to Grand avenue, to Lefferts place, to Saint James place, to Atlantic avenue, to Waverly avenue, to Willoughby avenue, to Hall street, and thence along Hall street to the place of beginning.

The fifty-third aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Prospect place and Fifth avenue, and running thence along Prospect place to Sixth avenue, to Lincoln place, to Seventh avenue, to President street, to Prospect park west, to the Prospect park plaza, to Flatbush avenue, and thence along the easterly, southerly and westerly sides of Prospect park to Eleventh avenue, to Prospect avenue, to Fourth avenue, to Garfield place, to Fifth avenue, and thence along Fifth avenue to the place of beginning.

The fifty-fourth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the waters of Newtown creek and Meeker avenue, and running thence along Meeker avenue, to Kingsland avenue, to Richardson street, to Manhattan avenue, to Bayard street, to Humboldt street, to Driggs avenue, to Union avenue, to Ten Eyck street, to Bushwick avenue, to Montrose avenue, to Bushwick place, to Boerum street, to White street, to Cook street, to Bushwick avenue, to Flushing avenue, to Central avenue, to Forrest street, to Morgan avenue, to Noll street, to Flushing avenue, to Knickerbocker avenue, to Melrose street, to Flushing avenue, and thence along Flushing avenue and to the dividing line between Kings and Queens counties, and thence along the dividing line between Kings and Queens counties to Newtown creek,

and thence along the waters of Newtown creek to the place of beginning.

The fifty-fifth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the East river and Broadway and running thence along Broadway to Berry street, to South Sixth street, to Broadway, to Havemeyer street, to South Second street, to Marcy avenue, to South First street, to Rodney street, to South Second street, to Union avenue, to Driggs avenue, to Leonard street, to Norman avenue, to Manhattan avenue, to Noble street, to Franklin avenue, to India street, and thence along India street to the waters of the East river, and thence to the place of beginning.

The fifty-sixth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the East river and India street and running thence along India street to Franklin street, to Noble street, to Manhattan avenue, to Norman avenue, to Leonard street, to Driggs avenue, to Humboldt street, to Bayard street, to Manhattan avenue, to Richardson street, to Kingsland avenue, to Meeker avenue, to the Newtown creek, and thence along the waters of Newtown creek and the East river to the place of beginning.

The fifty-seventh aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at Bay Eighth street and Gravesend bay and running thence along Bay Eighth street to Cropsey avenue, to Bay Seventh street, to Benson avenue, to Fourteenth avenue, to Seventy-ninth street, to Thirtieth avenue, to Sixtieth street, to Twelfth avenue, to Fifty-eighth street, to Thirteenth avenue, to Fortieth street, to Twelfth avenue, to Thirty-ninth street, to Tenth avenue, to Thirty-seventh street, to Fort Hamilton avenue, to Gravesend avenue, to Terrace place, to Eleventh avenue, to Fifteenth street, to Coney Island avenue, to Vanderbilt street, to Prospect avenue, to Fort Hamilton avenue, to Poplar street, to Johnson street, to Coney Island avenue, to Foster avenue, to East Seventeenth street, to Avenue I, to Flatbush avenue, to East Thirty-fourth street, to Avenue J, to Schenectady avenue, to Flatbush avenue, to Avenue R, to Burnett street, to Garrettson's mill pond, and thence along the waters of Garrettson's creek, Sheephead's bay, the Atlantic ocean and Gravesend bay, to the place of beginning.

The fifty-eighth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Dean street and Bedford avenue, and running thence along Bedford avenue to Lafayette avenue, to Lewis avenue,

to McDonough street, to Tompkins avenue, to Fulton street, to Schenectady avenue, to Pacific street, to Utica avenue, to Bergen street, to Albany avenue, to Atlantic avenue, to New York avenue, to Dean street, and thence along Dean street to the place of beginning.

The fifty-ninth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Dean street and Bedford avenue, and running thence along Dean street to New York avenue, to Atlantic avenue, to Albany avenue, to Bergen street, to Utica avenue, to Church avenue, to East Forty-ninth street, to Grant street, to Schenectady avenue, to Avenue J, to East Thirty-fourth street, to Flatbush avenue, to Avenue I, to East Seventeenth street, to Foster avenue, to Coney Island avenue, to Johnson street, to Poplar street, to Fort Hamilton avenue, to Prospect avenue, to Vanderbilt street, to Coney Island avenue, and thence around the southerly and easterly sides of Prospect park to Flatbush avenue, to southerly side of Institute park, to Washington avenue, to Montgomery street, to Franklin avenue, to Carroll street, to Bedford avenue, and thence along Bedford avenue to the place of beginning.

The sixtieth aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the dividing line between Kings and Queens counties at Flushing avenue, and running thence along Flushing avenue to Melrose street, to Knickerbocker avenue, to Flushing avenue, to Noll street to Hamburg avenue, to Forrest street, to Flushing avenue, to Bushwick avenue, to Cook street, to White street, to Boerum street, to Bushwick avenue, to Moore street, to Morrell street, to Flushing avenue, to Beaver street, to Park street, to Broadway, to DeKalb avenue, to Myrtle avenue, to Cedar street, to Central avenue, to DeKalb avenue, to Hamburg avenue, to Himrod street, to Knickerbocker avenue, to Harmon street, to Irving avenue, to Himrod street, to Wyckoff avenue, to Harmon street, to Saint Nicholas avenue, to Stanhope street, to the dividing line between Kings and Queens counties, and thence along the dividing line between Kings and Queens counties to the place of beginning.

The sixty-first aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of the dividing line between Kings and Queens counties at Stanhope street, and running thence along Stanhope street to Saint Nicholas avenue, to Harmon street, to Wyckoff avenue, to Himrod street, to Irving avenue, to Harmon street, to Knickerbocker avenue, to Himrod street, to Hamburg avenue, to DeKalb avenue, to Central avenue, to Cedar street, to Myrtle avenue, to DeKalb

avenue, to Broadway, to Moffat street, to Evergreen avenue, to Hancock street, to Central avenue, to Linden street, to Wyckoff avenue, to Ralph street, to Saint Nicholas avenue, to Bleecker street, and thence along Bleecker street to the dividing line between Kings and Queens counties, and thence along the dividing line between Kings and Queens counties to the place of beginning.

The sixty-second aldermanic district shall consist of that portion of the county of Kings within and bounded by a line beginning at the intersection of Bushwick avenue and Ten Eyck street, and thence along Ten Eyck street to Union avenue, to South Second street, to Rodney street, to Broadway, to Hooper street, to Harrison avenue, to Flushing avenue, to Broadway, to Park street, to Beaver street, to Flushing avenue, to Morrell street, to Moore street, to Bushwick avenue, to Boerum street, to Bushwick place, to Montrose avenue, to Bushwick avenue, and thence along Bushwick avenue to the place of beginning.

The sixty-third aldermanic district shall consist of that portion of the county of Kings of the state of New York, within and bounded by a line beginning at the intersection of Bleecker street and the Queens county line, thence along Queens county line to the boundary line between the twenty-sixth and twenty-eighth wards, to Bushwick avenue, to Stewart street, to Broadway to the boundary line between the twenty-fifth and twenty-sixth wards, to Atlantic avenue, to Rochester avenue, to Fulton street, to Patchen avenue, to Sumpter street, to Howard avenue, to Marion street, to Rockaway avenue, to Broadway, to Moffat street, to Evergreen avenue, to Hancock street, to Central avenue, to Linden street, to Wyckoff avenue, to Ralph street, to Saint Nicholas avenue, to Bleecker street, to the point of beginning.

The sixty-fourth aldermanic district shall consist of that portion of the county of Kings of the state of New York within and bounded by a line beginning at the intersection of the boundary line between the twenty-sixth and twenty-eighth wards and Bushwick avenue, running thence along the said boundary line of the twenty-sixth and twenty-eighth wards to the boundary line between Kings and Queens counties, to Duck Point marsh, to Jamaica bay, through the waters of Jamaica bay to Pennsylvania avenue, to Jamaica avenue, to Bushwick avenue, to the point of beginning.

The sixty-fifth aldermanic district shall consist of that portion of the county of Kings of the state of New York within and bounded by a line beginning at the intersection of Stewart street and Bushwick avenue, thence along Bushwick avenue to Jamaica avenue, to Pennsylvania avenue, to the waters of Jamaica bay, thence through the

waters of Jamaica bay, in a southerly direction, to a point in the boundary line between Kings and Queens counties opposite the easterly end of Duck Point marsh, thence along the boundary line between Kings and Queens counties through the waters of Jamaica bay south of Barren island to Dead Horse inlet, thence along the waters of Dead Horse inlet and Garrettson's creek to Garrettson's mill pond, to Burnett street, to Avenue R, to Flatbush avenue, to Schenectady avenue, to Grant or Snyder avenue, to East Forty-ninth street, to East Broadway or Church avenue, to Utica avenue, to Pacific street, to Schenectady avenue, to Fulton street, to Rochester avenue, to Atlantic avenue, to the boundary line between the twenty-fifth and twenty-sixth wards, to Broadway, to Stewart street, to the point of beginning.

The sixty-sixth aldermanic district shall consist of that portion of the county of Queens within and bounded by the East river, Bowery bay, old Bowery bay road, Jackson avenue, Rapelye avenue, the canal and Newtown creek.

The sixty-seventh aldermanic district shall consist of that portion of the county of Queens within and bounded by Morris avenue, Calamus road, Long Island railroad, Trotting Cross lane, Metropolitan avenue, boundary line of second and fourth wards, Vanderveer avenue, Jamaica avenue, Shore avenue, Atlantic avenue, Morris avenue, Rockaway road, boundary line of Queens and Nassau counties, Atlantic ocean, Jamaica bay and the boundary of Kings and Queens county.

The sixty-eighth aldermanic district shall consist of that portion of the county of Queens within and bounded by a line beginning at the canal running into Newtown creek, to Rapelye avenue, to Jackson avenue, to old Bowery bay road, to Bowery bay, to East river, to Boulevard, to Third avenue, to Fourth avenue, to Whitestone avenue, or road, to Union street, to Lincoln street, to Main street, to Bradford avenue, to Lawrence street or avenue, to Ireland Mill road, to Flushing creek, to the boundary line of the second and third wards, boundary line of second and fourth wards, to Metropolitan avenue, to Trotting Cross lane, to Long Island railroad, to Calamus road, to Maurice avenue, to Maspeth avenue, to Newtown creek, to the place of beginning.

The sixty-ninth aldermanic district shall consist of that portion of the county of Queens within and bounded by a line beginning at the East river and Boulevard, to Third avenue, to Fourth avenue, to Whitestone avenue, or road, to Union street to Lincoln street, to Main street, to Bradford avenue, to Lawrence street or avenue, to Ireland Mill road, to Flushing creek, to boundary line of third and

fourth wards, to Rocky Hill road, to boundary line of Nassau and Queens counties, to Little Neck bay, to East river, to the place of beginning.

The seventieth aldermanic district shall consist of that portion of the county of Queens within and bounded by a line beginning at the boundary line of the second and fourth wards, to boundary line between the third and fourth wards and Rocky Hill road, to boundary line between Nassau and Queens counties, Rockaway road, Morris avenue, Atlantic avenue, Shore avenue, Jamaica avenue, Vanderveer avenue, to the boundary line between the second and fourth wards, to the place of beginning.

Staten Island, as designated in section four hundred and twenty-five of this act, being the county of Richmond, is hereby divided into three aldermanic districts as follows: That portion of said Staten Island which was heretofore known as the town of Castleton, being the first ward of the borough of Richmond, shall constitute the seventy-first aldermanic district, and those portions of said Staten Island which were heretofore known as the towns of Middletown and Southfield, being the second and fourth wards of said borough of Richmond, shall together constitute the seventy-second aldermanic district, and those portions of said Staten Island which were heretofore known as the towns of Northfield and Westfield, being the third and fifth wards of said borough of Richmond, shall together constitute the seventy-third aldermanic district.

In case the board of elections or any lawful authority shall hereafter alter the boundaries of any of the election districts into which the city of New York is divided at the time of the passage of this act, such alteration shall be so made that no election district shall contain portions of any two aldermanic districts. The board of elections of the city of New York shall within thirty days after the passage of this act cause to be filed in the office of the clerks of the counties of New York, Kings, Queens and Richmond, a description of each of said aldermanic districts. The said board of elections shall also, whenever necessary, complete the description of the boundaries of any aldermanic district, but such aldermanic districts shall not be affected by any change in the assembly district lines. (*As amended by L. 1907, ch. 763.*)

§ 28. City clerk; appointment of deputies. (See 3d Ed., p. 23.)

The city clerk is a legislative office within the meaning of § 8 of the Civil Service Law, and his deputies therefore fall within the (unclassified) class of the Civil Service. *Matter of O'Grady v. Polk*, 132 App. Div. 47, 116 N. Y. Supp. 290.

Licenses to auctioneers. (See 3d Ed., p. 26.)

§ 34. The city clerk shall have authority to grant licenses to any person engaged in and carrying on the business and occupation of auctioneer, or desiring to be so engaged, on payment of the sum of one hundred dollars per annum, on such person filing a bond, approved by him, with two good sureties in the penal sum of two thousand dollars. The president of the board of aldermen on complaint of any person having been defrauded by any auctioneer, or by the clerk, agent or assignee of such auctioneer, doing business in said city, is authorized and directed to take testimony under oath relating thereto; and if the charge shall, in his opinion, be sustained, he shall revoke the license granted to such auctioneer, and direct his bonds to be forfeited. No person, persons, corporation or association shall hereafter carry on the business of auctioneer in the city of New York, without having first obtained from the city clerk a license authorizing such person, persons, corporation or association to carry on the business of auctioneer: and no person, corporation or association whose license has been revoked for cause shall again be licensed to carry on the business of auctioneer. Any person or persons, corporation, partnership or association who shall offer for sale, or sell goods of any description, wares, merchandise, real or personal property at vendue or auction without having first obtained from the city clerk a license authorizing such person or persons, corporation, partnership or association to carry on the business of auctioneer, shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than twenty-five nor more than one hundred dollars for each offense. But nothing in this section shall apply to a duly appointed marshal of the city of New York who, by virtue of his office by levy under legal process, sells goods, wares and merchandise or real or personal property, thus levied upon by him under such process. (*As amended by L. 1910, ch. 553.*)

Revocation of license reviewable by certiorari.

The president of the board of aldermen under this section cannot act arbitrarily in revoking the license of an auctioneer, but is governed by the evidence produced upon the hearing, and his determination revoking a license will be set aside upon certiorari unless the evidence adduced on the hearing establishes dishonesty or other misconduct on the part of the auctioneer. *Matter of Rosenthal*, 133 App. Div. 733, 110 N. Y. Supp. 241.

The granting of an auctioneer's license to a corporation is discretionary and when fairly and properly exercised cannot be controlled by the courts. *People ex rel. Stern's Auction Rooms v. Scully, Dowling, J.*, N. Y. Law Jour., April 24th, 1909.

§ 44. Enumeration of powers of board of aldermen not restrictive; general powers. (See 3d Ed., p. 33.)

General powers.

The right to adopt ordinances is only limited by the Constitution and the statutes, and the reasonableness of the same, and if reasonable, then it does not matter whether it deals with a condition constituting a common-law nuisance or not. *City of Buffalo v. Geo. P. Ray Mfg. Co.*, 124 N. Y. Supp. 913.

The board of aldermen is the judge as to what ordinances it will pass for the safety and welfare of the inhabitants of the city, and the protection and security of their property, and unless an ordinance passed by it, is wholly arbitrary and unreasonable, it should be upheld. The necessity and advisability of the ordinance is for the legislative power to determine. The presumption is in favor of the ordinance. *City of Rochester v. Macaulay-Fien M. Co.*, 199 N. Y. 207, aff'g 130 App. Div. 906, 115 N. Y. Supp. 1115.

Ordinances unreasonable, oppressive, in restraint of trade or discriminating in favor of any class of persons in the same business, are invalid. *People v. Gilbert*, 68 Misc. 48, 123 N. Y. Supp. 264.

City ordinances are invalid so far as they contravene the Constitution or statutes of the United States or the State, as the power of a municipal council to enact by-laws, delegated by the legislature, cannot be more extensive than the power of the delegating body. *People v. Gilbert*, 68 Misc. 48, 123 N. Y. Supp. 264.

City ordinances enacted pursuant to the authority of this section, have the force of law and the courts are without power to suspend their operation. *City of New York v. Hewitt*, 91 App. Div. 445, 86 N. Y. Supp. 832; *The Same v. Leaf*, 128 N. Y. Supp. 676.

The authority conferred by the legislature to enact ordinances and to enforce the same by imposing penalties, does not authorize the enforcement of mere contract obligations by the enactment of penal ordinances for a breach thereof. *The City of New York v. N. Y. City Ry. Co.*, 138 App. Div. 131, 123 N. Y. Supp. 132, rev'g 117 N. Y. Supp. 919.

Prescribed penalty.

The violation of an ordinance does not subject the wrongdoer to a civil liability for damages; but its disregard is something which in connection with other facts, furnishes some evidence upon the question of the liability of the wrongdoer. It is some evidence of negligence, but not necessarily negligence. *Fluker v. Ziegele Brewing Co.*, 201 N. Y. 40, rev'g 136 App. Div. 945, 121 N. Y. Supp. 1130.

The power of the board of aldermen under this section to enact an ordinance forbidding theatrical performances on Sunday in place of § 1481 of the

Charter, *infra*, pursuant to L. 1901, ch. 466, § 3, has not been affected by Penal Code, § 277 (now Penal Law, § 2152), covering the same subject. *City of New York v. Alhambra Theater Co.*, 136 App. Div. 509, 121 N. Y. Supp. 3.

Judicial notice of ordinances.

Courts will not take judicial notice of ordinances. *People ex rel. Cross Co. v. Ahearn*, 124 App. Div. 804, 109 N. Y. Supp. 249; *Schnaier v. Grigsby*, 134 App. Div. 854, 117 N. Y. Supp. 455; *Collender v. Reardon*, 138 App. Div. 738, 123 N. Y. Supp. 531.

Franchises for street railways. (See 3d Ed., p. 35.)

§ 45. Nothing in this act contained shall repeal or affect in any manner the provisions of the rapid transit acts applicable to the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, or any municipality united therewith or territory embraced therein, or to repeal or affect the existing general laws of the state in respect to street surface railroads, except that the rate of interest on all bonds issued for the construction and equipment of the rapid transit railway authorized pursuant to the provisions of chapter four of the laws of eighteen hundred and ninety-one as amended, shall be fixed by the board of commissioners of the sinking fund. The consent or approval of the board of aldermen to or for the issue of corporate stock of the city of New York, as provided by section one hundred and sixty-nine shall not be necessary to authorize the comptroller to issue such stock for the purposes prescribed in chapter four of the laws of eighteen hundred and ninety-one as amended. The board of estimate and apportionment and the comptroller of the city of New York shall, anything herein contained to the contrary notwithstanding, be subject to all the duties and obligations prescribed in said chapter four of the laws of eighteen hundred and ninety-one as amended for the board of estimate and apportionment and comptroller therein mentioned. Upon the execution of any contract made pursuant to chapter four of the laws of eighteen hundred and ninety-one, as amended, the board of rapid transit railroad commissioners may, in its discretion, make request upon the board of estimate and apportionment for the authorization of such corporate stock, either for such amounts from time to time as they shall deem the progress of the work to require, or for the full amount sufficient to pay the entire estimated expense of executing such contract. In case they shall make requisition for the entire amount, the comptroller shall endorse on the contract his certificate that funds are available for the entire contract whenever such stock shall have been authorized to be issued by said board

of estimate and apportionment; and in such case such stock may be issued from time to time thereafter in such amounts as may be necessary to meet the requirements of such contract. The certificate of the comptroller, mentioned in section one hundred and forty-nine of this act, shall not be necessary to make such contract binding on the city of New York. (*As amended by L. 1907, ch. 439, § 1.*)

Powers of board of aldermen; bonds for improvements; all powers subject to control of board of estimate. (See 3d Ed., p. 37.)

§ 47. The board of aldermen shall have power to provide by ordinance for the acquisition, construction or establishment of markets; for the acquisition and construction of parks, parkways, playgrounds, boulevards and driveways; for the building of bridges over, and of tunnels under any stream or waterway within or adjoining the limits of the city; for the building of docks, wharves or piers, and for acquiring land by purchase or condemnation, for said purposes; for acquiring, constructing, improving, permanently bettering and equipping public buildings, including school houses, libraries and sites therefor for the use of the city; for the repaving of streets; for building, repairing and equipping boats and vessels or other floating craft of any kind that may be needed for the use and purposes of the city; for the establishing, building and equipping of telegraph or other systems of communication for the use and purposes of the police department and other departments of the city government; for the construction and equipment of public comfort stations; for the making and completing of maps of all the territory embraced within each of the boroughs of said city; for the making and completing of surveys, maps and profiles in condemnation proceedings; and for any of the foregoing purposes may create loans and authorize the issue of bonds or other evidences of indebtedness, to pay for the same, payable at such times, and in such manner, as it may by ordinance prescribe; and at such rates of interest as the board of commissioners of the sinking fund may prescribe; but no bonds or other evidences of indebtedness shall be issued under the authority of this section, unless the proposition for creating such debt shall first be approved by a majority vote of the whole board of estimate and apportionment, entered on the minutes of record of such board. In case any bonds or corporate stock shall have been heretofore issued under authority of this section, as to which the board of aldermen did not prescribe any rate of interest by ordinance, the rate that may have been otherwise fixed and specified shall be the legal and valid rate. In addition to the specific purposes hereinbefore set forth, the board of aldermen

may also create loans and authorize the issue of bonds for any other purpose connected with the exercise of the various powers conferred by this act upon the city of New York or any department or official thereof; provided, however, that no bonds or other evidences of indebtedness shall be issued for such additional purposes unless first approved by a unanimous vote of the board of estimate and apportionment, entered upon the minutes of record of said board; provided, however, that all the powers in this section or elsewhere in this act granted to the board of aldermen shall be subject to the control of the board of estimate and apportionment over all the street,* avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and all public grounds and waters which are within or belong to the city as provided in this act. (*As amended by L. 1908, ch. 376.*)

§ 49. Ordinances and regulations for certain purposes. (See 3d Ed., p. 39.)

Weighing of coal.

City Ordinance, § 388 enacted pursuant to this section imposing a penalty for falsifying weight of coal on sale is not in conflict with L. 1900, ch. 327, § 150, inhibiting sale of coal of less than 2000 pounds to the ton. *City of New York v. Marco*, 58 Misc. 225, 109 N. Y. Supp. 58.

The provisions of § 388 of the ordinances of the city of New York, imposing a penalty upon persons who sell or offer for sale coal "at or for a greater weight or measure than the true measure thereof" is not inconsistent with or affected by the provisions of L. 1900, ch. 327, § 150, which inhibits the sale of coal "at less than 2000 pounds by weight to the ton;" the purpose of the statute and ordinance being to provide for the protection of the public, they are both operative. *City of New York v. Marco*, 58 Misc. 225, 109 N. Y. Supp. 58.

Fireworks.

The discharge of fireworks in a street on a public occasion is not a nuisance *per se*, but depends upon attending circumstances of the degree of danger whether it is a nuisance in fact. *Molker v. City of New York*, 190 N. Y. 481, aff'g 117 App. Div. 923, 103 N. Y. Supp. 1134.

Signs.

The power of the municipal assembly to regulate by ordinance the use of the streets for signs, etc., does not apply to the erection of signs on buildings, which are governed by Building Code, § 144, established by the municipal assembly under § 407, as ch. 15 of the Code of Ordinances of the city of New York. *City of New York v. Wineburgh Adv. Co.*, 122 App. Div. 748, 107

*So printed in Session laws.

N. Y. Supp. 478; *Same v. O. J. Gude Co.*, 122 App. Div. 741, 107 N. Y. Supp. 484.

Bill boards and sky signs.

The provisions of § 144 of the Building Code requiring a permit from the superintendent of buildings for the erection of bill boards and sky signs is confined in its operation to the signs therein designated, and has no application to an ordinary commercial sign fastened in the usual manner, flat against the outside of a building wall. *People v. Schmidt*, 51 Misc. 258, 100 N. Y. Supp. 1094.

Structures generally.

A municipality in enacting ordinances relating to the safety of the public, may make reasonable classifications amongst structures, with reference to their location, and the necessity or importance thereof, without offending against the provisions of U. S. Constitution, Amendment 14, but the classification, as well as the ordinance itself, must be based upon some necessity justifying the exercise of the police power. *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, aff'g 129 App. Div. 260, 113 N. Y. Supp. 855 which rev'd 60 Misc. 536, 113 N. Y. Supp. 854.

Vaults.

Where the city has never given a license for the construction of vaults under a public street pursuant to the statute authorizing it to license such vaults, it may demand a fee for their maintenance no matter how long they have been in existence. But if a license for vaults has been granted, the owner of the land when desiring to enlarge the vaults has a right to build new vaults in the space formerly occupied by the old without an additional permit or the payment of an additional fee, provided the continuance of the vault does not interfere with the street or impair its use by the public. *Mahoney v. City of New York*, 145 App. Div. 884, 130 N. Y. Supp. 602.

The rights of a public service corporation occupying the streets for a quasi-public purpose, i. e., supplying steam to consumers through pipes, under a public franchise, cannot be interfered with by the holder of a subsequent revocable permit to construct a vault in front of private premises under the sidewalk, and the holder of the permit is liable for any damages to the plant of the public service corporation caused in construction of the vault. *N. Y. Steam Co. v. Foundation Co.*, 195 N. Y. 43, rev'g 123 App. Div. 254, 108 N. Y. Supp. 86.

The retaining wall of a vault built pursuant to a permit on the outside of the curb line of a street may be removed by the city in furtherance of a public improvement, e. g., the construction of the subway, without subjecting the city to liability for trespass. *Potter v. Interborough Rapid Transit Co.*, 54 Misc. 423, 105 N. Y. Supp. 1071; aff'd 124 App. Div. 920, 108 N. Y. Supp. 1145.

§50. Regulation of streets. (See 3d Ed., p. 44.)**Traffic; regulation of automobiles.**

A resolution of the board of aldermen authorizing certain designated persons to speed automobiles at a greater rate of speed than that prescribed by the statute. *Held*, not to be an exercise of the power to regulate the speed of automobiles given by the statute, but a license or permit to do an unlawful act and therefore is invalid. *Johnson v. City of New York*, 186 N. Y. 139, aff'g, on this point, 109 App. Div. 821, 96 N. Y. Supp. 754.

The common council of the city in exercising the authority conferred by the Motor Vehicle Law, L. 1904, ch. 538, to limit the rate of speed of motor vehicles, must prescribe the same rate of speed for motor vehicles as that adopted for all other vehicles, and the penalty for violation of such rate of speed must be the same as that prescribed in the case of all other vehicles. An ordinance fixing the rate of speed of motor vehicles does not become operative until signs have been erected which notify all drivers upon entering the limits of the city that they are required to lower their speed to the rate established. *People ex rel. Hainer v. Keeper of Prison*, 190 N. Y. 315, aff'g 121 App. Div. 645, 106 N. Y. Supp. 314 which rev'd 55 Misc. 611, 106 N. Y. Supp. 960.

The provisions of the Motor Vehicle Law, L. 1904, ch. 538, authorizing the common council of cities to limit the speed of motor vehicles only confers upon such authorities the power to prescribe a lower rate of speed than that permitted by the general law. The common council of the city may fix penalties for exceeding such lower rate and any person driving a motor vehicle in excess of such lower rate but not in excess of the speed limitation prescribed by the general law is liable to prosecution and punishment under the ordinance; but any person who violates the speed limitation prescribed by the general law itself, even though such violation occurs within the limits of the city, remains liable to prosecution and punishment under the provisions of the general law. *People ex rel. Hainer v. Keeper of Prison*, 190 N. Y. 315. Compare *People v. Ellis*, 88 App. Div. 471, 85 N. Y. Supp. 120.

Setting apart highway for private purpose.

A spectator, as distinguished from a traveler or occupant of land adjoining a street, attending an automobile race to witness and enjoy the contest, is not entitled to recover against the city for personal injuries caused by an automobile, although the use of the street for the race is illegal. *Bogart v. City of New York*, 200 N. Y. 379, rev'g 138 App. Div. 888, 122 N. Y. Supp. 1122; *Johnson v. The Same*, 186 N. Y. 139, rev'g 109 App. Div. 821, 96 N. Y. Supp. 754.

The board of aldermen have no power to grant to individuals the right to appropriate the highways of the city for a private purpose. So held, holding a resolution of the board of aldermen authorizing a certain automobile club to use a highway as a concourse for automobiles competing against time to be invalid and void. *Johnson v. City of New York*, 186 N. Y. 139, aff'g, on

this point, 109 App. Div. 821, 96 N. Y. Supp. 754. Compare L. 1904, ch. 538, § 3, subd. 6.

Encroachments.

It is no defense to a proceeding to compel the removal of an unlawful obstruction that the same was erected under authority of a permit issued by the municipal authorities. *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259; *City of New York v. Knickerbocker Trust Co.*, 52 Misc. 222, 102 N. Y. Supp. 900; modified on other grounds, 121 App. Div. 740, 106 N. Y. Supp. 506.

The common council has no power to permit an abutting owner on a street lying within three hundred feet of a public park to erect an ornamental wall eight feet in height which encroaches six or seven feet beyond the building line. Such a structure is a nuisance, the maintenance of which will be enjoined upon suit by the city. *City of New York v. Rice*, 56 Misc. 360, 107 N. Y. Supp. 641; *aff'd* 128 App. Div. 903, 112 N. Y. Supp. 1124, *aff'd* 198 N. Y. 124.

A resolution of the board of aldermen which attempts to grant to an owner the right to erect a portico and steps in front of its building, which appropriates practically one-half of the sidewalk, is absolutely void and the construction thereof constitutes a nuisance which will be restrained upon suit by the city. *City of New York v. Knickerbocker Trust Co.*, 52 Misc. 222, 102 N. Y. Supp. 900; modified on other grounds, 121 App. Div. 740, 106 N. Supp. 506.

Permanent structures beyond the building line of Fifth avenue, consisting of a platform in a courtyard with tile floor and railing and skeleton frame for support of awning, used as an extension of a restaurant in the building, are not within the ordinance of 1884 extending to lot owners on Fifth Avenue, the privilege of inclosing a court fifteen feet wide with an open railing in front. *People ex rel. Cross v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

Show windows with cornices and glass fronts which encroach on the public street from three to four feet and entrance porticos encroaching over seven feet on the highway are unlawful and public nuisances, which it is the duty of the public authorities to abate. *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92.

The ordinance authorizing the construction of bay windows projecting three feet beyond the building line, *held* invalid. Neither the board of aldermen nor the park commissioners have the power to authorize encroachments upon the street. *Williams v. Silverman Const. Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945.

A bay window on a corner house encroaching 2½ feet over the building line of a street, will not make the title unmarketable so as to relieve a purchaser at a foreclosure sale, it appearing that the city for 15 years acquiesced

in the construction and recently, pursuant to ordinance, issued a permit therefor. *Ebert v. Hauneman*, 69 Misc. 223, 125 N. Y. Supp. 237.

The building commissioner has no power under former charter of city of Brooklyn, as amended by L. 1894, ch. 481, continued in force by Greater New York Charter, to permit a violation of an ordinance forbidding any bay window extending into a street more than a foot from the wall. *Heyman v. Steich*, 134 App. Div. 176, 118 N. Y. Supp. 1113, aff'g 114 N. Y. Supp. 603.

In an action by the city of New York to compel the removal of a stoop extending beyond the building line of Broadway and constituting a nuisance, the boundary line of that street may be established from the monuments and distances shown by the certified map filed September 16, 1869, pursuant to ch. 890, L. 1869, authorizing the straightening and widening of Broadway. *City of New York v. U. S. Trust Co.*, 116 App. Div. 349, 101 N. Y. Supp. 574.

Remedies for the removal of encroachments.

A court of equity will entertain jurisdiction of a suit brought by the city to compel the removal of an encroachment upon a street of long standing and which is maintained under a claim of right although the maintenance of the encroachment is punishable by a penalty under the municipal ordinances. *City of New York v. DePeyster*, 120 App. Div. 762, 105 N. Y. Supp. 612; *City of New York v. Knickerbocker Trust Co.*, 52 Misc. 222, 102 N. Y. Supp. 900; modified, on other grounds, 121 App. Div. 740, 106 N. Y. Supp. 506.

There are two courses opened to a property owner who complains of an obstruction upon the highway maintained by his neighbor. He may institute a suit in equity to compel his neighbor to remove the obstruction or may call upon the proper public officer by mandamus to perform his duty and to remove the obstruction. If the property owner adopts the former remedy, the court will in its discretion refuse to grant a mandatory injunction if it appears that the plaintiff is himself a trespasser upon the highway or that he suffers no real damage from the obstruction of which he complains. If the property owner, however, adopts the latter remedy by mandamus, the court cannot refuse relief upon equitable grounds. The remedy by mandamus does not rest upon any private injury done to the relator but upon respondent's infringement upon the property and rights of the public. Where, therefore, the removal of the obstruction on the highway is sought by mandamus it is immaterial that the relator is himself a trespasser upon the highway or that the obstruction has been in existence for a long time, and that relator and its predecessors in interest have not complained thereof, for no prescriptive right to occupy the streets can be gained as against the public, and no adjoining owner can legalize such obstructions by acquiescence. *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92. To same effect, *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

Where an unlawful obstruction has existed for a long time and no public necessity demands its instant removal, the writ of mandamus should direct

the proper authority to remove the obstruction forthwith or in their discretion to take such legal measures as are appropriate to compel the removal of the obstruction by the party maintaining the same and if such proceedings are instituted, to prosecute them with all reasonable speed and diligence. *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259.

A private citizen and resident of the city may compel, by mandamus, the borough president to remove an unlawful incumbrance or obstruction from the public streets although the applicant has not suffered any special injury or damage by the incumbrance. *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

A foreign corporation who is the lessee of a building located within the city has the right to institute mandamus to compel the public authorities to remove an obstruction on the street maintained by his neighbor. A foreign corporation which has obtained a certificate to do business in the State is entitled to the equal protection of its laws. *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92.

Areas and cellarways.

It seems that the common council has the power to authorize the construction and maintenance of areaways within the stoop line for the purpose of light or access to the cellars or basements of buildings. *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

An areaway extending into the street more than five feet from the building line is in violation of the ordinances of the city and is therefore a nuisance the continuance of which will be restrained upon suit by the city. *City of New York v. DePeyster*, 120 App. Div. 762, 105 N. Y. Supp. 612.

The ordinances of 1843 and 1844 permitting owners of property on both sides of Fifth avenue to enclose fifteen feet of the sidewalk as a courtyard were absolutely void. *City of New York v. Knickerbocker Trust Co.*, 52 Misc. 222, 102 N. Y. Supp. 900; modified, on other grounds, 121 App. Div. 740, 106 N. Y. Supp. 506. Compare *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

Assuming that the city had the power to pass the ordinance of 1844, extending to lot owners on Fifth avenue the privilege of enclosing a court fifteen feet wide with an open railing for the purpose of ornamenting the avenue, such ordinance does not authorize the construction of a platform in lieu of such court and the placing of a boiler and machinery under the same for the private use of an abutting owner. *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249.

A cellarway created by the permission of an ordinance and built as provided thereby, is not a nuisance, making an owner liable to a person who fell into it, sustaining injuries, when the premises were under the exclusive control of a tenant. *Opper v. Hellinger*, 116 App. Div. 261, 101 N. Y. Supp. 616.

Awnings.

A wooden awning extending from the building line to the curb is an unlawful encroachment upon the public street and constitutes a nuisance; its existence for fifteen years raises no presumption that the owner has acquired a right to use the street, as the city had no power to grant to an individual such right; accordingly the city is liable for damages to a pedestrian injured by the fall of the awning. *Mansfield v. City of New York*, 119 App. Div. 199, 104 N. Y. Supp. 386.

A wooden awning extending over a street in the city of New York which is supported by wooden pillars so placed that they are knocked down by a passing vehicle, is a nuisance and the municipality is liable for injuries received by the fall thereof. *Mansfield v. City of New York*, 119 App. Div. 199, 104 N. Y. Supp. 386.

The city cannot be held liable for injuries sustained to a pedestrian, by stumbling over an awning brace in front of a building, upon the theory of the maintenance of a nuisance by the city, where it appears that the city neither created nor maintained the awning. Nor can the city be held liable upon the theory that it acquiesced in the erection of an unauthorized awning. The provisions of this section provide for the authorization of awnings by general ordinances and the city therefore cannot be held liable on the theory of authorization by acquiescence, even if mere acquiescence were otherwise sufficient. *Herman v. City of New York*, 131 N. Y. Supp. 1032.

Temporary obstructions for business purposes.

City Ordinance, § 262, enacted under authority of this section, prohibiting placing of goods at greater distance than three feet in front of store, etc., except goods in process of loading or unloading, construed that the obstructions must be reasonable with reference to the rights of the public in the street. *City of New York v. Leef*, 128 N. Y. Supp. 676.

Taxicab stand.

A contract by a hotel proprietor giving a cab company the exclusive right to maintain a motor cab service station on the street adjacent to the hotel, for the transportation of guests and such other persons as may desire to use the vehicles of the cab company, is invalid, as it contravenes the provisions of Revised Ordinances, §§ 317, 318, enacted under this section, which limit the right of specially licensed cabs to use the streets in front of hotels to soliciting and taking passengers who are guests of the hotel only. *New York Taxicab Co. v. Hawk & Wetherbee*, 68 Misc. 555, 125 N. Y. Supp. 220.

The lease of a store of a hotel gives the tenant no right to sublet desk room, etc., with privilege of maintaining a sightseeing automobile at the curb, and the license by the landlord to a taxicab company to maintain a cab stand in front of the premises, pursuant to municipal authority, which interferes with use of street by the automobile, constitutes no partial eviction of tenant. *U. S. Restaurant & Realty Co. v. Schulte*, 67 Misc. 633, 124 N. Y. Supp. 835.

An unlicensed hackman cannot be restrained from doing business on the suit of a licensed hackman where the only special injury alleged is the loss of patronage through the competition of the unlicensed hackman. *Hefferon v. New York Taxicab Co.*, 146 App. Div. 311, 130 N. Y. Supp. 710.

Signs; billboards and advertising on vehicles.

An ordinary commercial sign affixed to the wall of a building to indicate the business of the occupant, without a permit from the superintendent of buildings, does not violate § 144 of the Building Code enacted by board of aldermen pursuant to § 407, *infra*, which has reference to "billboards" and "sky signs" only. *People v. Schmidt*, 51 Misc. 258, 100 N. Y. Supp. 1094.

The municipal authorities can grant no right to erect billboards or signs on the side of a temporary shed erected by permission of the municipal authorities over the sidewalk, to protect pedestrians from falling objects during construction of building. *Sullivan Adv. Co. v. City of New York*, 61 Misc. 425, 113 N. Y. Supp. 893.

Under this section, giving the board of aldermen power to regulate the use of the streets for the exhibition of signs and advertisements, and to make such regulations in reference to the running of stages and other vehicles as may be necessary for the convenient use and the accommodation of the streets, an ordinance prohibiting the display of advertisements upon wagons and other vehicles, except business notices upon ordinary business wagons engaged in the usual business or work of the owner and not used merely or mainly for advertising, is a proper and reasonable exercise of the authority to regulate the business conducted in the streets of the city, vested in the board of aldermen. *Fifth Ave. Coach Co. v. City of New York*, 194 N. Y. 19, *aff'd* 126 App. Div. 652, 110 N. Y. Supp. 1037.

Under the ordinance regulating the use of advertising on trucks, wagons, etc., a stage company may use the exterior of its stages for advertising its own business but it cannot use them for the purpose of advertising any other business than that which it conducts itself. *Fifth Ave. Stage Co. v. City of New York*, 126 App. Div. 657, 110 N. Y. Supp. 1037, *aff'd* 194 N. Y. 19.

Street car licenses.

A municipality cannot forbid what a statute has licensed or expressly permitted, nor may it license what the State has expressly interdicted. *People v. Gilbert*, 68 Misc. 48, 123 N. Y. Supp. 264.

The board of aldermen has no power to enact an ordinance imposing a license fee upon passenger cars with a penalty for failure to pay it—with respect to a railroad having a franchise to use the streets by virtue of an original grant in the nature of a contract to operate passenger cars conditioned upon paying a license fee for each car. The omission to pay the license fee under such grant is a mere breach of a private contract as distinguished from an unlawful act, and no penalty can be imposed for the

failure to pay the license fee. *City of New York v. New York City Ry. Co.*, 138 App. Div. 131, 123 N. Y. Supp. 132, *aff'd* 203 N. Y. 67 (memo.)

Public comfort station.

The city is not liable for an injury sustained by a person slipping on the steps of a comfort station because the plan failed to provide for hand rail or for rubber or metal treads on the steps, unless it appears that the plans as made and executed were not adopted by the proper authorities. The burden of showing the absence of such adoption is on the plaintiff. *Pitman v. City of New York*, 141 App. Div. 670, 125 N. Y. Supp. 941.

City's liability for failure to exercise powers.

Where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is quasi-judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the street or improvement made, the duty of keeping it in repair is ministerial, and for neglect to perform such a duty an action by the party injured will lie. *Pitman v. City of New York*, 141 App. Div. 670, 125 N. Y. Supp. 941.

Board of aldermen; licensing and regulating certain trades or business; dog licenses, etc. (See 3d Ed., p. 49.)

§ 51. Subject to the constitution and laws of the State, the board of aldermen shall have power to provide for the licensing and otherwise regulating the business of dirt carts, public cartmen, truckmen, hackmen, cabmen, expressmen, car-drivers and boatmen; of boot-blacks; of pawnbrokers, junk-dealers, keepers of intelligence offices, dealers in second-hand articles, hawkers, peddlers, vendors and scalpers in coal freights; of menageries, circuses and common shows; of shooting galleries, bowling alleys and billiard tables for hire; of bone boiling, fat rendering and other noxious businesses; and shall have power to regulate or forbid the keeping of dogs. The board of aldermen shall also have power to regulate the rates of fare to be taken by owners or drivers of hackney coaches, carriages, motors, automobiles or other vehicles, and to compel the owners thereof to pay annual license fees. All ordinances in relation to any of the matters mentioned in this section shall be general, shall provide for the enforcement thereof in the manner specified in section forty-four of this act as amended, and shall fix the license fees to be paid, if any. All licenses shall be according to an established form, and shall be regularly numbered and duly registered as shall be prescribed by the board of aldermen. (*As amended by L. 1910, ch. 262.*)

Moving pictures.

The power of the mayor to revoke licenses granted to operate moving pictures under ordinances of the board of aldermen, made pursuant to this section for licensing common shows—must be exercised for cause and not arbitrarily or unreasonably. *Fox Amusement Co. v. McClellan*, 62 Misc. 100, 114 N. Y. Supp. 594; *McKensie v. The Same*, 62 Misc. 342, 116 N. Y. Supp. 645.

An exhibition of moving pictures used for the purpose of attracting customers to a place of business is a "common show" within the provision of this section, authorizing the board of aldermen to provide for the regulating and licensing of "menageries, circuses and common shows." *Weistblatt v. Bingham*, 58 Misc. 328, 109 N. Y. Supp. 545. Compare *People v. Hemleb*, 127 App. Div. 356, 111 N. Y. Supp. 690.

An exhibition of moving pictures does not fall within the phrase "or other public sports, exercises or shows" in Penal Code, § 265, which prohibits the desecration of a Sunday, as that section applies only to out-of-door sports, exercises or shows, and does not prohibit an indoor exhibition of moving pictures. *People v. Hemleb*, 127 App. Div. 356, 111 N. Y. Supp. 690.

Employment agency.

General Business Law, Article 11 (L. 1909, ch. 25, as amended by L. 1910, ch. 700), provides for the regulation of the business of employment agencies in cities of the first class, which includes the city of New York, requiring bonds, regulating fees and creating the position of Commissioner of Licenses appointed by the mayor, and subordinates and inspectors, and it is made the duty of such Commissioner and inspectors to visit agencies and see that the act is being complied with. The Commissioner has the power to revoke a license for cause, and the statute prohibits the granting of a license to anyone whose license has been revoked. Violations of the act are made misdemeanors.

The Commissioner of Licenses has no power to refuse consent to a change of location of a licensed employment agency, on the sole ground that the licensee having sold his business, had agreed with the purchaser not to engage in a similar business elsewhere, and the commissioner's refusal to consent to a change of location being based solely on this objection, mandamus lies to compel him to act although the consent is to some extent a matter of discretion. *People ex rel. Cosby v. Robinson*, 141 App. Div. 656, 126 N. Y. Supp. 546.

One who is licensed to conduct a business as an employment agent may employ an unlicensed person on terms agreed upon and is liable for his services. *Calugerovich v. Yuzzolino*, 110 N. Y. Supp. 984.

Two days' notice of a hearing of charges against the keeper of an employment agency held sufficient in the absence of special circumstances re-

quiring a longer notice. *People ex rel. Pachtold v. Bogart*, 122 App. Div. 872, 107 N. Y. Supp. 831.

A party who has preferred charges against one holding a license to keep an employment agency with the commissioner of licenses, cannot intervene as a defendant in an action brought by such licensee to restrain the commissioner from revoking his license. *Hapgood v. Bogart*, 124 App. Div. 875, 109 N. Y. Supp. 537.

After a municipal license to conduct an employment agency would have expired by its own time limitation, certiorari will not lie to review a revocation of the license made during its term. *People ex rel. Pechtold v. Bogart*, 122 App. Div. 872, 107 N. Y. Supp. 831.

Expressmen.

Section 305 of the Code of Ordinances providing for the licensing of persons engaged in the business of expressmen and § 315 of the Code of Ordinances providing that "Every person driving a licensed hack or express, other than the person named in the license therefor, shall be licensed as such driver, and every application for such license shall be indorsed, in writing, by two reputable residents of the city of New York certifying to the competence of the applicant." *Held* not violative of the federal constitution or the provision of this section requiring the passage of general ordinances relating to street traffic; also *held*, that the ordinances were applicable to express companies engaged in interstate commerce. *Barrett v. City of New York*, 183 Fed. 793.

Junk dealers.

Requiring a license from a junk dealer and the regulation of such business is a legitimate exercise of the police power of the city. Whether a dealer in old iron is a junk dealer depends upon the general character and scope of his business and *held*, that one who buys great masses of metal at a time for shipment to mills and furnaces, and does not buy or sell single pieces of iron, is not a junk dealer from whom a license may be required under a municipal ordinance. *The City of New York v. Vanderwater*, 113 App. Div. 456, 99 N. Y. Supp. 306.

Hawkers and peddlers.

Courts will not take judicial notice of ordinances passed by virtue of this section, but they must be offered in evidence. *Collender v. Reardon*, 138 App. Div. 738, 123 N. Y. Supp. 587.

In the absence of evidence of ordinance to the contrary, the use of streets by hawkers and peddlers is recognized under the common law and statutory regulations, and the mere presence in the street of a push cart peddler, injured in a collision, is not contributory negligence as a matter of law. *Collender v. Reardon*, 138 App. Div. 738, 123 N. Y. Supp. 587.

The right to use of the street by peddlers being recognized by this section, a duly licensed peddler injured by a vehicle driven on a city street, cannot be charged with contributory negligence as a matter of law merely because he plied his trade upon the street. *Collender v. Reardon*, 138 App. Div. 738, 123 N. Y. Supp. 587.

A municipal ordinance which prohibits peddling of fruits, farm or garden produce on the city streets between five A. M. and one P. M. is void, being class legislation and in restraint of trade by restricting the sale of such produce to grocers and shopkeepers. *City of Buffalo v. Linsman*, 113 App. Div. 584, 98 N. Y. Supp. 737.

A license to hawk and peddle granted to a veteran under the General Business Law does not relieve the licensee from compliance with an ordinance passed by the board of aldermen under this section, relating to the licensing of hawkers and peddlers doing business within the city. *City of Buffalo v. Linsman*, 113 App. Div. 584, 98 N. Y. Supp. 737; *Eggleston v. Scheibel*, 60 Misc. 250, 112 N. Y. Supp. 114.

A veteran holding a license to hawk and peddle under the General Business Law is not authorized to set up boxes as a stand in a public street and maintain them there for a length of time, contrary to city ordinance forbidding the obstruction of a city street. *Eggleston v. Scheibel*, 60 Misc. 250, 112 N. Y. Supp. 114. Compare *People v. Gilbert*, 68 Misc. 48, 123 N. Y. Supp. 264.

Taxicabs.

An ordinance adopted by the board of aldermen imposing a higher license fee and reduced maximum rate of fare upon motor vehicles equipped with a taximeter, than upon other vehicles using the public streets *held*, unconstitutional in that it deprives the former of the equal protection of the laws. *Sp. T., Bischoff, J., Universal Taximeter Cab Co. v. City of N. Y.*, N. Y. Law Jour., Sept. 16th, 1910.

Theater ticket speculators.

An ordinance forbidding the sale in the streets of the city of tickets of admission in front of theaters, places of amusement, etc., or the soliciting of the purchase of the same and providing a penalty for violation, is a valid exercise of the powers of the board of aldermen in the control and regulation of the streets, and is not unconstitutional as depriving any citizen of the right of earning his livelihood in a lawful manner. *People ex rel. Lange v. Palmiter*, 71 Misc. 158, 128 N. Y. Supp. 426.

Sale of theater tickets is not "hawking" or "peddling" of merchandise within meaning of this section and ordinances enacted thereunder. *People v. Marks*, 64 Misc. 679, 120 N. Y. Supp. 1106.

§ 54. Board of aldermen; to see to the faithful execution of the laws, etc. (See 3d Ed., p. 51.)

Investigation of city departments.

The authority conferred upon the board of aldermen by this section to investigate the affairs of the departments of the city, is not exclusive and does not affect or impair the powers of the commissioners of accounts under § 119, *post*. *Matter of Hertle*, 54 Misc. 354, 105 N. Y. Supp. 1022, *aff'd* 120 App. Div. 717, 105 N. Y. Supp. 765, *aff'd* 190 N. Y. 531.

§ 56. Salaries of officers to be fixed by aldermen. (See 3d Ed., p. 52.)

Power to fix salaries.

The power to fix salaries is vested in the board of aldermen upon the recommendation of the board of estimate and apportionment. The heads of departments have no power to fix salaries. *Colihan v. Miller*, 72 Misc. 140, 131 N. Y. Supp. 99.

The provisions of this section confer no power upon the board of aldermen to create positions but simply authorizes the board to fix the salaries of officers and employees which are payable out of the city treasury. *Sullivan v. McAneny*, 145 App. Div. 413, 130 N. Y. Supp. 24.

After the adoption of the annual budget, the only way by which provision can be made for the payment of salaries of positions legally created and for which salaries have been fixed by the board of aldermen under this section, but for which no appropriation has been specially made in the budget, is by the transfer by the board of estimate and apportionment, under § 237, *post*, of the unexpended balance of the sum appropriated by the budget to other positions which have been abolished, to the payment of such salaries. *Colihan v. Miller*, 72 Misc. 140, 131 N. Y. Supp. 99.

Officers and employees included within section.

The board of aldermen is authorized by this section to fix the salary of all employees of the department of education except day laborers, teachers, examiners and members of the supervising staff of the department. *So held*, holding that the salary of a janitor of a school is fixed by the board of aldermen under this section. *People ex rel. Ajas v. Board of Education*, 104 App. Div. 162, 93 N. Y. Supp. 300; *Farrell v. Board of Education*, 113 App. Div. 405, 98 N. Y. Supp. 1046; *Lester v. The Same*, 119 N. Y. Supp. 887; *Hogan v. City of New York*, 200 N. Y. 370, *aff'g* 137 App. Div. 255, 121 N. Y. Supp. 924.

The power to increase the salary of a statistician of the board of education is vested in the board of aldermen and not in the board of education, which has power only to fix the salaries of positions expressly put under its jurisdic-

tion by this section and §§ 1067, 1091, *infra*. *Hogan v. Board of Education*, 137 App. Div. 255, 121 N. Y. Supp. 924.

Employees of Metropolitan Sewerage Commission are not within the provisions of this section, which includes only city officers, and its provisions are therefore inapplicable to an engineer appointed by the Commission. *People ex rel. Allen v. Metz*, 61 Misc. 363, 113 N. Y. Supp. 1007.

The salary of employees appointed by the board of trustees of Bellevue and allied hospitals, must be fixed by the board of aldermen under this section. *People ex rel. Barton v. Brannon*, 141 App. Div. 295, 126 N. Y. Supp. 47, *rev'g* 69 Misc. 38, 125 N. Y. Supp. 691.

Right to salary as fixed.

An employee is entitled to his salary as fixed by the board of aldermen, and he is not estopped from claiming such salary by receiving a less sum each month. *McGrade v. City of New York*, 126 App. Div. 362, 110 N. Y. Supp. 517.

Surveyors in the city of New York appointed pursuant to the authority given by the charter, while not strictly public officers, are nevertheless entitled to receive their compensation at rates provided by the local law at the time their services are rendered, and are not restricted to the statutory compensation existing at the time of their appointment. *People ex rel. Crane v. Ahearn*, 125 App. Div. 795, 110 N. Y. Supp. 306.

Prevailing rate of wages.

The provision of the Labor Law providing that the prevailing rate of wages should be paid to workmen employed upon public works has no application to a janitor in the public school whose position is that of a municipal employee specifically recognized by § 1074 of the charter. The salary of a janitor is fixed by the board of aldermen under this section and he cannot recover wages in excess of those assigned to him on the theory that other janitors are paid higher wages. *Farrell v. Board of Education*, 113 App. Div. 405, 98 N. Y. Supp. 1046.

Extra compensation.

The provision of the Labor Law which prohibits municipal corporations from entering into contracts with its employees for more than eight hours work per day deprives an employee of the city of the right to recover extra compensation for services rendered in excess of eight hours a day. *Burns v. City of New York*, 121 App. Div. 180, 105 N. Y. Supp. 605.

Where an employee resigns his position in the classified service and for which an annual salary of \$1,500 had been provided, and upon the day of his resignation was appointed at an increased salary to a position not classified, and for which no salary had been fixed by the board of aldermen and the board of estimate and apportionment, he cannot, after having been paid at

the rate of \$1,500, recover the difference between that rate and the increased rate. *Middleton v. City of New York*, 50 Misc. 587, 99 N. Y. Supp. 440.

§ 73. Limitations and conditions to grants of franchises. (See 3d Ed., p. 61.)

Power to grant franchises.

The amendments made to the Greater New York Charter by L. 1905, ch. 629, deprive the board of aldermen of the power to grant franchises to construct and operate railroads in the city streets and conferred that power solely upon the board of estimate and apportionment. *Hatfield v. Straus*, 117 App. Div. 671, 102 N. Y. Supp. 934; *aff'd* 189 N. Y. 208.

The power to grant a franchise to a corporation to lay wires for distributing electricity under the streets of the city is conferred upon the board of aldermen as the "municipal authorities" within Transportation Corporations Law (L. 1909, ch. 219, § 61) and not upon the commissioner of water supply, gas and electricity as successor of the board of electrical control under § 528, *post*. *People ex rel. West Side El. Co. v. Consolidated Tel. & E. Subway Co.*, 187 N. Y. 58, *aff'g* 110 App. Div. 171, 96 N. Y. Supp. 609.

Under the provisions of the Transportation Law requiring the consent of the local authorities of an adjoining city or village as a condition of laying down water mains by a corporation organized under the statute to supply water, *held*, that the local authorities designated was the legislative body empowered to grant franchises for the use of the street and that a mere permit to lay mains obtained from the administrative officers of the city, e. g., the president of the borough or the commissioner of water supply, or a contract with the city to supply it with water were not equivalent to a franchise to lay mains for that purpose. Nor is a right to lay such mains without a franchise conferred by § 516, *post*, providing that all persons acting under the authority of the city shall have the right to use the soil under public streets for the purpose of introducing water into the city of New York, because without a franchise the company is not acting under the authority of the city. *Richards v. Citizens' Water Supply Co.*, 140 App. Div. 206, 125 N. Y. Supp. 116.

The amendment made in 1905 to this section, transferring the power to grant franchises for street railways from the board of aldermen to the board of estimate and apportionment is constitutional. *Wilcox v. McClellan*, 185 N. Y. 9, *aff'g* 110 App. Div. 378, 97 N. Y. Supp. 311; *Pettit v. Same*, 185 N. Y. 529, *aff'g* 110 App. Div. 390, 97 N. Y. Supp. 320.

The provisions of this section limiting a franchise to twenty-five years and requiring grants thereof to be by the authorities therein named, applies to a telephone company, incorporated after the section went into effect. A new corporation by merger with an older corporation acquired no greater rights than those then held by the merged company, and these rights cannot be enlarged by a certificate of extension filed after the charter went into effect

without obtaining the consent of the authorities therein named. Therefore a telephone corporation, which has not conformed to the provisions of this section is not entitled to mandamus, compelling the issue of a permit to lay wires. Although § 102 of the Transportation Corporations Law did not extend to telegraph and telephone companies, the requirement of obtaining the consent of local authorities in force as to pipe, gas and electric lighting lines and water pipes, L. 1881, ch. 483, contains such requirements as to telephone and telegraph companies, and it, by the statutory consolidation of 1909, is now contained in § 102 of the Transportation Corporations Law. In the Matter of N. Y. Independent Telephone Co., 133 App. Div. 635, 118 N. Y. Supp. 290, aff'd 200 N. Y. 527.

A statute incorporating a gas company provided that the company would have the power to sell gas in any part of New York city "provided that no street shall be dug into without the permission of the municipal authorities" or of a majority in interest of the adjacent property holders. *Held* that the statute granted a perpetual and absolute franchise, which needed no secondary franchise from the legislative branch of the municipal government, but merely an administrative consent as to time and place, in order to make it operative, to authorize the gas company to dig up the streets and lay pipes. It seems that even if the franchise did require a secondary franchise or legislative grant by the municipal government of permission to lay pipes in the streets, an ordinance giving "permission to lay pipes in the streets for thirty years" would give the right to perpetually maintain all pipes that had been laid during the thirty years by a company that had possessed the franchise from the state. *City of New York v. N. Y. Mutual Gas, etc., Co.*, 135 App. Div. 260, 120 N. Y. Supp. 776.

Independent approval of mayor.

The making of a contract by the city of New York merely for the construction of a subway, which is to be and remain the property of the city, does not grant to the contractor a franchise or right to use the street, within the meaning of the statutory provisions requiring in certain cases the separate and independent approval of the mayor. *Admiral Realty Col. v. Gaynor*, 132 N. Y. Supp. 223.

What constitutes a franchise.

The board of estimate and apportionment has no power to grant to the proprietors of a store a permit to lay down private railroad tracks in front of their premises and operate cars thereon in connection with the street railroads for the conveyance of goods from and to their store, and an adjoining owner whose property will be damaged thereby is entitled to an injunction restraining the taking of any steps under such permit. *Hatfield v. Straus*, 189 N. Y. 208, aff'g 117 App. Div. 671, 102 N. Y. Supp. 934.

A resolution of the board of estimate and apportionment, giving a right to maintain a tunnel or passageway under a street between two buildings, all used for the purposes of a retail dry goods store, does not constitute a fran-

chise, but is analogous to a right to construct a vault under a sidewalk. *People ex rel. Abraham v. Perley*, 67 Misc. 471, 123 N. Y. Supp. 436.

A permit by the city authorities to tap the end of a city water main to connect with a pipe on private premises for purpose of supplying same with water, is not a franchise, which can only be granted by the board of aldermen under this section. *People ex rel. Peter Cooper's Glue Factory v. State Board of Tax Commissioners*, 143 App. Div. 174, 127 N. Y. Supp. 992.

Franchises granted by former city of Brooklyn.

A franchise granted in good faith by the municipal authorities of the former city of Brooklyn, after the passage of the charter but before it went into effect which contained no provision limiting its operation to any period of time, was good for twenty-five years under this section. *People ex rel. Flatbush Co. v. Coler*, 54 Misc. 21, 103 N. Y. Supp. 590.

The commissioner of parks of Brooklyn had authority on January 2, 1906, after the passage of L. 1886, ch. 583, giving to the department of public parks of Brooklyn, full control of the Ocean Parkway, and before the adoption of the Greater New York charter, to grant to a corporation the right to erect poles, wires, etc., for electric lights in the Parkway, but a contract made subsequently between the municipal authorities and the corporation modifying the former grant by providing for underground wires, and made in good faith, but containing no provision limiting its operation to any time, will be held good for a period of twenty-five years under the provisions of this section. *People ex rel. Flatbush Gas Co. v. Coler*, 54 Misc. 21, 103 N. Y. Supp. 590.

§ 74. Proceedings prior to grant of franchise. (See 3d Ed., p. 63.)

The procedure of the local authorities in granting a franchise for the use of the public streets by street railway corporations, is governed by this section rather than by the Railroad Law, § 92, as the Charter provision is later in date and covers the whole subject-matter. *Schieffelin v. McClellan*, 135 App. Div. 665, 120 N. Y. Supp. 215.

§ 83. Grants of lands and franchises to city in aid of commerce. (See 3d Ed., p. 65.)

The title of the city in navigable waters is held not of individual right, but in trust for the people at large. See *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 129 App. Div. 574, 114 N. Y. Supp. 313, *aff'd* 198 N. Y. 287.

See *Matter of Wheeler*, 62 Misc. 37, 115 N. Y. Supp. 605, cited under § 826, *post*.

§ 85. Private rights protected. (See 3d Ed., p. 66.)

Where a lease of lands under water contains a provision authorizing the city to cancel the lease should the property be required for the improvement.

of the water front, *held*, that the city was not justified in cancelling the lease upon the filing of a tentative plan for the improvement of the water front which the city has made no attempt to carry out. *Donohue v. City of New York*, 54 Misc. 415, 105 N. Y. Supp. 1069.

The defendant, a littoral owner, erected a pier and structure in Staten Island, fronting on the waters of New York bay, in such a manner that the effect was to obstruct the passage of the public to and from the premises of the plaintiff, the lessee, of certain uplands. *Held*, that while the defendant had a right to erect a pier he could not unnecessarily interfere with right of passage over the beach by the public, and plaintiff having shown special injury, is entitled to enjoin the defendant from obstructing or interfering with the passage of the public over the beach between high and low water mark, in front of defendant's upland. *Barnes v. Midland R. R. Terminal Co.*, 193 N. Y. 378, rev'g 126 App. Div. 435, 110 N. Y. Supp. 545.

The existence of a public street between the outer edge of the upland and tide water will not separate riparian rights from the upland. *Ennis v. Grover*, 53 Misc. 66, 103 N. Y. Supp. 1088, aff'd 120 App. Div. 879, aff'd 192 N. Y. 584.

§ 95. Mayor's power of removal. (See 3d Ed., p. 70.)

Removals not reviewable by court.

The action of the mayor in removing the aqueduct commissioners, by a written notice without trial or hearing, is not reviewable by writ of certiorari. *Matter of Ryan*, 66 Misc. 481, 122 N. Y. Supp. 94.

§ 101. Department of parks; park board. (See 3d Ed., p. 72.)

The head of the department of parks shall be called the park board. Said board shall consist of four members who shall be known as commissioners of parks. (*As amended by L. 1911, ch. 644.*)

§ 118. Mayor to appoint heads of departments. (See 3d Ed., p. 76.)

Power of appointment discretionary.

The mayor in appointing commissioners of elections is not confined in his choice to the names certified to him by the chairman of the New York and Kings County committee of the two principal parties. The power of appointment vested in the mayor is a discretionary power and contemplates a voluntary act on his part in making appointments. *Matter of Kane*, 144 App. Div. 196, 129 N. Y. Supp. 280, aff'g 71 Misc. 163, 129 N. Y. Supp. 990; aff'd 202 N. Y. 615.

§ 119. Mayor to appoint commissioners of accounts. (See 3d Ed., p. 77.)

Powers and duties of commissioners of accounts.

The provisions of this section authorizing the commissioners of accounts to examine the accounts of public officers of the city and take testimony under oath are constitutional and valid. *Matter of Hertle*, 120 App. Div. 717, 105 N. Y. Supp. 765, *aff'g* 54 Misc. 354, 105 N. Y. Supp. 1022; *aff'd* 190 N. Y. 531.

Power is conferred upon the commissioners of accounts by this section to examine the accounts of elective officers of the city as well as those who are appointed to office. So held, holding the president of the borough of Manhattan to be subject to examination by the commissioner of accounts. *Matter of Hertle*, 120 App. Div. 717, 105 N. Y. Supp. 765, *aff'g* 54 Misc. 354, 105 N. Y. Supp. 1022; *aff'd* 190 N. Y. 531.

The powers of the commissioners of accounts to conduct examinations under this section are not affected by the like authority of the board of aldermen to investigate under § 54, *ante*. *Matter of Hertle*, 54 Misc. 354, 105 N. Y. Supp. 1022, *aff'd* 120 App. Div. 717, 105 N. Y. Supp. 765; *aff'd* 190 N. Y. 531.

The persons contemplated to be examined as witnesses under the provisions of this section, are city employees and no others, and the commissioners of account have no power to issue a *subpoena duces tecum* to produce private books and papers of a person not in the city employ. *Matter of Foster*, 68 Misc. 120, 123 N. Y. Supp. 465, *aff'd* 139 App. Div. 769, 124 N. Y. Supp. 667.

This section authorizing commissioners of accounts to compel the attendance of witnesses to be examined under oath, prescribes no method by which the attendance can be secured, and the section must be read in connection with Code Civ. Pro., § 854, authorizing the issuing of a subpoena by persons expressly authorized by law to do any act in an official capacity in which proof may be taken requiring the attendance of a person as a witness and also in a proper case to bring with him a book or a paper. But this provision giving the commissioners power to subpoena witnesses did not intend to repeal by implication the provisions of the Civil Rights Law which protects citizens against unreasonable search and seizure. Hence to make "out a proper case" and to secure "due process of law" a *subpoena duces tecum* cannot be issued by the commissioners unless it is made to appear that the books and papers to be produced have some materiality or relevancy to a matter lawfully under consideration. *Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667, *aff'g* 68 Misc. 120, 123 N. Y. Supp. 465.

Mandamus will not lie to compel the commissioner of accounts to furnish to a taxpayer under § 1545, *infra*, the minutes of an investigation had under this section, of the accounts and methods of the office of the President of the Borough. *People ex rel. Woodill v. Fosdick*, 141 App. Div. 450, 126 N. Y. Supp. 252.

§ 124. Regulations of Municipal Civil Service. (See 3d Ed., p. 79.)

Liberal construction of statute.

The primary purpose of the Civil Service Law and rules is to promote the good of the public service and that purpose should not be frustrated by technical or narrow constructions. *Matter of Dalton v. Darlington*, 123 App. Div. 855, 108 N. Y. Supp. 626.

Positions not subject to the Civil Service Law.

Confidential positions are as a matter of law exempt from examinations, not by force of express statute, but because the courts in construing the provisions of the constitution requiring merit and fitness to be ascertained by competitive examination, only so far as practicable, have held that it is not practicable to determine such merit and fitness as to positions which are essentially confidential, in their nature, and as to their duties, as the expression "confidential position" has been or shall be construed judicially when arising as to a given office. *In re Simmons*, 145 App. Div. 471, 130 N. Y. Supp. 306. Compare *People ex rel. Hoeft v. Cahill*, 188 N. Y. 489, rev'g 116 App. Div. 885, 102 N. Y. Supp. 325; *People ex rel. Tate v. Dalton*, 158 N. Y. 204; *In re Breckenridge*, 160 N. Y. 103; *O'Keefe v. McFadden*, 75 App. Div. 264, 78 N. Y. Supp. 87; *People ex rel. Jussen v. Scannell*, 51 App. Div. 360, 64 N. Y. Supp. 593; *People ex rel. Jones v. Baker*, 12 Misc. 389, 34 N. Y. Supp. 49.

The civilian male probationary officers to be appointed by the boards of city magistrates of the first and second divisions, pursuant to § 96 of ch. 659 of L. 1910, relating to the inferior criminal courts of the city of New York bear a confidential relation to the magistrates and are not required to be filled from an eligible list after a competitive examination pursuant to the Civil Service Law. *Matter of Benchin v. Kempner*, 69 Misc. 410, 127 N. Y. Supp. 614.

The classification of the position of probation officer in the exempt class of the civil service, by the legislature (L. 1910, ch. 659, § 96), sustained on the ground that the duties performed by these officers are of a character and relationship to the judicial officers having the power and responsibility of making the appointments, which makes it impracticable to determine the merit and fitness of appointees by competitive or non-competitive examination. *In re Simmons*, 145 App. Div. 471, 130 N. Y. Supp. 306.

While the declaration of the legislature as to the character of a position is not conclusive upon the court in determining whether the classification of a given position in the exempt class overrides the constitutional requirement, it must be regarded with great respect and be given force and effect, unless clearly doing violence to the character of the position, when considered in relation to the duties attaching thereto. *In re Simmons*, 145 App. Div. 471, 130 N. Y. Supp. 306.

The head of a department cannot by assigning temporarily certain duties to a position created as an ordinary clerkship, transform it at will into the office of private secretary, cashier or deputy and thereby deprive the incumbent of the protection from removal conferred upon veterans by the Civil Service Law. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, rev'g 116 App. Div. 885, 102 N. Y. Supp. 325.

The provisions of the Civil Service Law exempting the position of deputy cashier and private secretary from the operation of the statute protecting veterans from removal was intended to apply only to positions brought within these exempted classes by the terms of the laws which created or authorized and defined them, or at the most to positions which under some sufficient authority at the discretion of the appointing or superior authority, have been invested with the duties and character of one of the exempted positions. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, rev'g 116 App. Div. 885, 102 N. Y. Supp. 325.

Classification of civil service; competitive and non-competitive class.

When the particular character and functions of an office or position have been ascertained, the question whether competitive examination for appointment to that place is practicable or not is a question determinable by the court, as matter of law, by the exercise of its judgment, and in the light not only of the proof, but of common knowledge, as applied to the subject-matter. *In re Simmons*, 145 App. Div. 471, 130 N. Y. Supp. 306.

The determination of the civil service commission in classifying positions in the public service, although involving the exercise of judgment and discretion, is more of a legislative or executive character than judicial or quasi-judicial, and, therefore, is not reviewable by certiorari. Such determination, however, is not final, but is subject to a limited and qualified judicial control to be exercised in a proper case by mandamus. If the position is clearly one properly subject to competitive examination, the commissioners may be compelled to so classify it. On the other hand, if the position be by statute or from its nature exempt from examination and the action of the commission be palpably illegal, the commission may be compelled to strike the position from the competitive or examination class, though in such case redress by mandamus would often be unnecessary, as a valid appointment could be made notwithstanding the classification. But where the position is one, as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification. *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, rev'g 100 App. Div. 176, 91 N. Y. Supp. 675; *Matter of Dill*, 185 N. Y. 106, aff'g 100 App. Div. 155, 91 N. Y. Supp. 686.

The classification by the civil service commission of the position of coroner's physician in the competitive class is not invalid. The question whether the position was within the competitive or non-competitive class was one to

be decided by the commission and its determination will not be disturbed by the courts. *Matter of MacLeod v. McGuire*, 71 Misc. 166, 129 N. Y. Supp. 883; *Matter of Nammack*, 145 App. Div. 289, 130 N. Y. Supp. 211, rev'g 66 Misc. 523; N. Y. Supp. 1063.

The classification by the civil service commission of the position of battalion chief of the fire department in the competitive class of the civil service will not be controlled by mandamus. The position of battalion chief is one of that character the classification of which rests in the discretion and judgment of the civil service commission and is not properly the subject of review by the courts. *Matter of Dill*, 185 N. Y. 106, aff'g 100 App. Div. 155, 91 N. Y. Supp. 686.

The classification by the civil service commission in the non-competitive class of the positions of deputy assistant city attorneys, managing clerk, registrar and detectives in the law department is a matter within the discretion of the civil service commission, and as the question as to whether they should be in the competitive or non-competitive class is a matter of opinion, and not a strict question of law, mandamus does not lie to compel the commissioners to change their determination. *Matter of Hammond v. Ricker*, 140 App. Div. 19, 124 N. Y. Supp. 406.

Mandamus does not lie to compel a municipal civil service commission to reclassify positions as so to make them non-competitive unless the State commissioners are made parties, as any reclassification is subject to their approval. *Matter of Hammond v. Ricker*, 140 App. Div. 19, 124 N. Y. Supp. 406.

Examination of applicants.

A printed statement at the top of an examination paper that "A systematic verification of the statements in this paper will be made" does not constitute a contract with the candidates that their answers to statements concerning their personal history and experience will be verified, but is rather a warning to candidates to avoid misleading or exaggerated statements. The omission of the examiner therefore, to verify the statements of candidates by reference to information obtained by external inquiry does not render the examination invalid. *Matter of Darling v. Maguire*, 70 Misc. 597, 129 N. Y. Supp. 385.

Questions propounded to candidates for civil service examinations which have some relevancy to the duties of the position the candidates seek to fill, do not render the examination illegal, and avoid its results because one of the questions is so framed that it is impossible to give a correct answer to it, and another treats of a condition that is so rare as to be a medical curiosity. *Matter of Darling v. Maguire*, 70 Misc. 597, 129 N. Y. Supp. 385.

Upon an application to set aside a competitive civil service examination and to revoke certificates to appointments to positions based thereon, the

court will not intervene if the action of the civil service commission is not palpably illegal. *Matter of Darling v. Maguire*, 70 Misc. 597, 129 N. Y. Supp. 385.

An examination will not be set aside because the examiner in estimating the credit to be given upon the "experience paper," took into consideration not only the length and quality of the previous experience of the candidates as disclosed by their answers; but also for the method with which they answered the questions propounded on the paper. *Matter of Darling v. Maguire*, 70 Misc. 597, 129 N. Y. Supp. 385.

Eligible list and appointments therefrom.

The eligible list as certified by the civil service commission is binding upon the appointing officer and he cannot refuse to accord to a veteran upon such list the preference to appointment conferred upon him by law, on the ground that the civil service commission had violated the law in placing his name upon such list. *Burke v. Holtzmann*, 110 App. Div. 564, 97 N. Y. Supp. 218.

The provisions of the Civil Service Law and the rules adopted pursuant thereto providing that appointments shall be made from among the three persons graded highest upon the eligible list, are valid and leave ample power of selection to the appointing officer. A rule limiting the selection of the appointing officer to the one graded highest on the eligible list, however, would be invalid as interfering with the constitutional right of the local authorities to select their own officers. *People ex rel. Qua v. Gaffney*, 142 App. Div. 122, 126 N. Y. Supp. 1027.

Where one of the three persons graded highest on the eligible list is a veteran, he is entitled to a preference to appointment over the other two who are not veterans, and if such preference is denied he is entitled to enforce it by mandamus. *People ex rel. Qua v. Gaffney*, 142 App. Div. 122, 126 N. Y. Supp. 1027.

A civil service rule, relating to eligible lists for the office of inspector of police in the city of New York, which provides that an eligible list that has been in force one year shall terminate whenever a new list is established, does not contravene the provision of the Civil Service Law (L. 1899, ch. 379), that the term of eligibility shall be fixed for each list at not less than one nor more than four years. *Golland v. Baker*, 52 Misc. 187, 102 N. Y. Supp. 721.

The provisions of L. 1900, ch. 513, changing the office of County Clerk of Richmond County to a salaried officer and providing that assistants in his office employed therein on January 1, 1909, and continuing in office until the act took effect, should be retained in employment, provided, that prior to the first day of January, 1910, they had successfully passed a non-competitive civil service examination, did not make it mandatory upon the county clerk to retain in employment all the assistants who had passed a non-competitive

civil service examination. The act merely contemplates that the county clerk in exercising the power of appointment, so far as the efficient administration of his office permitted it, to retain those prior incumbents who had worked in the office during the year 1909, and had successfully passed a non-competitive civil service examination. If the intention of the legislature went beyond this, and designed to perpetuate the employment of all temporary and accidental clerkships which under the fee system had been engaged in the office during the year 1909, regardless of the permanent needs of the office, such an attempt would be unconstitutional. *People ex rel. Sullivan v. Mayor*, 128 N. Y. Supp. 776.

Emergency appointment.

The temporary employment by the day of a person in the position of watchman to the Brooklyn Disciplinary School for Boys is not in violation of the Civil Service Law where his employment is needed to meet an emergency created by the exhaustion of the list of those eligible to the position filled by him. *Gallagher v. City of New York*, 115 App. Div. 662, 101 N. Y. Supp. 229.

Temporary appointments.

The temporary appointment of a person to a position in the classified civil service can never ripen into a permanent appointment, and the fact that the incumbent has passed the civil service examination for the position, does not entitle him to a preference to the permanent appointment to such position over those who have obtained a higher rating on the eligible list. *Matter of Darling v. Maguire*, 70 Misc. 597, 129 N. Y. Supp. 385. *Contra*, *People ex rel. Webb v. Millikin*, 66 Misc. 192, 122 N. Y. Supp. 793.

The temporary appointment of a person to the higher grade in the classified civil service, and his continuance in such position without having passed a civil service examination for promotion, does not constitute a permanent appointment to the higher grade and the incumbent is not entitled to the salary attached to the position. *People ex rel. Murphy v. Bingham*, 130 App. Div. 112, 114 N. Y. Supp. 702; *aff'd* 196 N. Y. 519.

Probationary appointments.

The head of a department had no power under the Civil Service Law and the rules of the municipal civil service commission adopted pursuant thereto, to appoint a clerk in the classified civil service for a period other than the probationary period of three months designated by the rules. The statute and the rules are positive in this respect and leave nothing to the discretion of the appointing officer. The failure of the appointing officer therefore, to designate that his appointment of a clerk in the classified civil service is for a probationary term, has no effect upon the nature of the tenure of which the appointee holds the position. *McVay v. City of New York*, 116 N. Y. Supp. 908.

A clerk in the classified civil service illegally removed during his probationary periods is entitled to reinstatement by mandamus only to the

remainder of the probationary period. His removal constitutes a suspension of the probationary period which he must still serve before his appointment ripens into a permanent employment in the classified civil service. *McVay v. City of New York*, 116 N. Y. Supp. 908.

Where the head of a department sought to serve notice of dismissal upon an employee on the last day of the probationary period, but was unable to do so owing to his absence in violation of orders, *held* that service of such notice three days later, when he again reported for duty, was not untimely and that he could not claim that the probationary term had ripened into a permanent appointment. *Matter of Dalton v. Darlington*, 123 App. Div. 855, 108 N. Y. Supp. 626.

A clerk in the classified civil service illegally removed during the probationary period upon his reinstatement to the position, may recover from the city his salary during the period he was excluded from the performance of its duties. *McVay v. City of New York*, 116 N. Y. Supp. 908.

It seems that an employee of a department whose appointment has become permanent by reason of the expiration of the probationary period, may be removed after notice and an opportunity for explanation for acts done within that period. *Matter of Dalton v. Darlington*, 123 App. Div. 855, 108 N. Y. Supp. 626.

Promotions.

The provision of the Civil Service Law which makes an increase of compensation constitute a promotion has no application to the ungraded class of the civil service of the city. *People ex rel. Stokes v. Tully*, 108 App. Div. 345, 95 N. Y. Supp. 1153, *aff'd* 47 Misc. 275, 95 N. Y. Supp. 916.

An increase in compensation although unaccompanied by a change in the character of the work performed is a promotion within the Civil Service Law which can only be made in conformity with the provision of the statute requiring the eligibility for promotion to be determined by competitive examination unless it is shown that the promotion is based upon some qualification which cannot be practically ascertained by examination. *Matter of Dryer*, 52 Misc. 612; 102 N. Y. Supp. 922. But compare *People ex rel. Halleran v. Creelman*, 73 Misc. 377; 130 N. Y. Supp. 1052.

Where the civil service commission, upon the request of the appointing officer, transferred an employee of the department from the position held by him to another with more important duties and with a larger salary, without examination, *held*, that the transfer was a promotion and therefore invalid because not made in conformity with the Civil Service Law. *Hale v. Worstell*, 185 N. Y. 247, *aff'd* 107 App. Div. 624, 96 N. Y. Supp. 1131.

The provision of the civil service rules prescribing six months' faithful service by an employee of a department in his present position as a condition of eligibility for examination for promotion to a higher grade, constitutes a

reasonable exercise of the powers of the municipal civil service commission to fix preliminary requirements for promotion and is not violative of the Constitution of the Civil Service Law. So *held*, denying mandamus to compel the admission for examination for promotion of an assistant fireman who had not served six months in his present position. *Matter of Ricketts*, 111 App. Div. 669; 98 N. Y. Supp. 502.

A police sergeant is not entitled to take the examination for promotion to the position of lieutenant until he has served continuously for two years as a sergeant. *Sp. T., Truax, J. Matter of Murphy*, N. Y. Law Jour., December 27th, 1909.

Rule 15 of the municipal civil service, providing for an efficiency record of employees, which may be considered on an examination for promotion, requires a carefully prepared record made from month to month of services which have been rendered. It contemplates a record made at a time when the person is not an active candidate for promotion, and should deal with "comparative conduct; seniority and efficiency in previous service." Hence, where no such record was kept, but prior to an examination for promotion a record was filed giving an employee credit for fidelity, excellency, etc., and stating that other employees were "good," "very good," etc., but without stating the period of service of the several applicants, the one rated as "excellent," etc., is not entitled to a higher credit than the others. *People ex rel. Steele v. McGuire*, 139 App. Div. 680, 124 N. Y. Supp. 552.

The municipal civil service commission in acting under § 288 of the Greater New York Charter had the power to pass a resolution providing that, in fixing the relative ratings of candidates for promotion in the police department, only such commendations and honorable mentions should be considered as should have been awarded as a result of individual acts of personal bravery; and the commission may not be compelled by mandamus to revise and re-rate the marking of a policeman in a competitive examination for promotion so as to include credit for a certain act of meritorious police service not involving personal bravery. *Morris v. Baker*, 49 Misc. 440, 99 N. Y. Supp. 957.

When a police officer in the city of New York has been once promoted for an heroic act, he is not again entitled to be credited with marks for the same act when he enters a competitive civil service examination to get on the eligible list for promotion to a still higher grade. *People ex rel. Burns v. Baker*, 124 App. Div. 565, 108 N. Y. Supp. 969.

A petition for a writ of mandamus to compel the municipal civil service commission to give the relator a special examination for promotion, upon the ground that he had been unlawfully removed from office when a prior examination took place; *held*, properly denied for laches where it appeared that months had elapsed between the time the relator was denied the special examination and his application for the writ. Such delay is not excused by

the fact that the relator's attorney advised him to await the determination of an appeal in another proceeding involving similar questions. Also held that the moving papers were fatally defective as it did not appear from them that the relator made an application to enter the regular examination for promotion or that he was eligible for such examination or would have taken the same if he had not been dismissed before it was held. *People ex rel. Reith v. Polk*, 138 App. Div. 497, 122 N. Y. Supp. 1048.

Certificate to pay roll.

The civil service commission cannot refuse to certify the pay roll of one who has been regularly appointed in conformity with the Civil Service Law, upon the ground that the commissioner erred in placing his name upon the list of those eligible to appointment. *Lazenby v. Municipal Civil Service Commission*, 116 App. Div. 135, 101 N. Y. Supp. 5; *aff'd* 188 N. Y. 588.

The duty of certifying the pay roll is vested exclusively in the civil service commission and the head of the department is not required to certify the pay roll to the commission. The statute contemplates the certification to be by and not to the civil service commission. *People ex rel. Jones v. Thompson*, 132 N. Y. Supp. 215.

Restraining payment of salary.

A taxpayer's action to restrain the payment of salary to a public officer, on the ground that he is not lawfully entitled to hold office, will lie where the facts are solely matters of record and are indisputable, so that no question can arise for the determination of a jury. *Forman v. Bostwick*, 139 App. Div. 333; 123 N. Y. Supp. 1048.

Removals based upon political opinions or affiliations.

The provision of the Civil Service Law that no appointment or removal should be in any manner affected by political opinions or affiliations, is merely directory and cannot be enforced by mandamus. The provision has no application to the non-competitive class but applies only to the competitive class of the civil service. *People ex rel. Garvey v. Prendergast*, 132 N. Y. Supp. 115.

Removal of employees in the classified civil service.

See cases cited under § 1543, *post*.

Veteran Acts, to whom applicable.

The Veteran Acts are applicable to a position which by the charter has no definite tenure. The incumbent of such a position is not removable at pleasure but can only be removed in conformity to the provisions of the Civil Service Law. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, *rev'g* 116 App. Div. 885, 102 N. Y. Supp. 325.

Veterans, when removable.

The provisions of the Civil Service Law prohibit the removal of a veteran, except for incompetency or misconduct shown after hearing had. The

veteran is entitled, not merely to the service of charges upon him and to an opportunity of explaining them, but to the service of formal and specific charges showing misconduct or incompetency upon his part and to a formal hearing thereon, and to the right to appear by counsel and to have the charges established by a preponderance of competent evidence. *People ex rel. Long v. Whitney*, 143 App. Div. 17, 127 N. Y. Supp. 554.

Charges which will justify the removal of a veteran in the classified civil service must be substantial, not trivial or technical, or showing a mere mistake of judgment without bad faith or evil purpose. *People ex rel. Long v. Whitney*, 143 App. Div. 17, 127 N. Y. Supp. 554.

It seems, that a veteran in the classified civil service should not be removed for a single act of negligence unless in the light of the attendant facts and circumstances, it constitutes such a serious failure of duty as to show incompetency. *People ex rel. Long v. Whitney*, 143 App. Div. 17, 127 N. Y. Supp. 554.

Although the absence of an inspector in the tenement house department of the city of New York for two days, without leave, is ground for his removal by the tenement house commission, yet, where the inspector is a veteran of the Spanish War, he is entitled to a hearing upon charges properly preferred. *People ex rel. Holahan v. Butler*, 63 Misc. 360, 118 N. Y. Supp. 459.

A registrar in the department of health may be removed after trial upon charges for professional misconduct, while acting as a physician in private practice and outside of his official duties, although he has been previously indicted and acquitted upon a criminal charge based upon the same misconduct. *People ex rel. Wood v. Department of Health*, 144 App. Div. 628, 129 N. Y. Supp. 255.

Where the mayor notified the commissioner of correction that an employee in his office must be forthwith brought to trial for purchasing certain articles at an excessive price and that he must be discharged unless the commissioner should show good reasons to the contrary, and it appeared that the employee, a veteran, having a good record for fourteen years, had in a single instance, through neglect in failing to correct a requisition for the articles, let the bill therefor go through to the comptroller at a price greater than that at which those actually furnished could be purchased in the open market, a new hearing will be ordered because a finding of misconduct was not warranted by the evidence, irrespective of whether the neglect of duty amounted to incompetency, and also because the action of the commissioner may have been influenced by the letter of the mayor. *People ex rel. Long v. Whitney*, 143 App. Div. 17, 127 N. Y. Supp. 554.

Volunteer firemen.

The head of a department is not charged with notice that an employee is a volunteer fireman and entitled to the protection of the statute by reason of

the filing by such employee of an exempt volunteer fireman's certificate in one of the offices of the department. *People ex rel. Robesch v. President of Borough*, 190 N. Y. 497, rev'g 121 App. Div. 229, 105 N. Y. Supp. 607.

A person claiming reinstatement on the theory that he was a volunteer fireman must allege such fact in the writ of mandamus or he cannot obtain the relief demanded. The incorporation in the writ of a letter of the relator's attorney stating that there was no question in his mind but that the relator being a volunteer fireman was entitled to reinstatement, *held*, not equivalent to an allegation that relator was a volunteer fireman. *People ex rel. Fogarty v. Cassidy*, 118 App. Div. 693, 103 N. Y. Supp. 671, aff'd 196 N. Y. 568.

Where the facts attending membership in a fire department show clearly that the person claiming such membership and exemption by reason thereof, never became a member of the fire company in good faith, and when he joined the company never expected or intended to perform any fire duty, and in point of fact never did perform any, he is not entitled to the exemption, provided for by § 21 of the Civil Service Law, from removal from a position held by him by appointment or employment upon the ground of service in a volunteer fire department. *People ex rel. Schulum v. Harburger*, 132 App. Div. 260, 116 N. Y. Supp. 994.

A certified copy of an exempt volunteer fireman's certificate does not conclusively establish that the party producing it is a volunteer fireman, and the head of a department has the right to attempt to disprove the statements contained in such certificate and establish that the party is not entitled to the rights of a volunteer fireman. Where an employee of the department who has produced such a certificate refuses to answer questions put to him by the head of the department respecting his services and connection with the volunteer fire company, the head of the department is justified in refusing to accord to him the trial required by the Civil Service Law in the case of the removal of a volunteer fireman. *People ex rel. Storey v. Butler*, 124 App. Div. 148, 108 N. Y. Supp. 848.

Abolishing positions.

The head of the department for the purpose of economy, may reduce the staff of employees therein and his action is not invalid because he retains in employment, a volunteer fireman, entitled under the statute to a preference in employment. *Sullivan v. McAneny*, 145 App. Div. 413, 130 N. Y. Supp. 24.

An inspector appointed by the trustees of Bellevue and allied hospitals, to inspect the construction of a particular hospital, although a veteran, may be discharged when the work is finished so that an inspector is no longer necessary. *Matter of Barton v. Brennan*, 141 App. Div. 295, 126 N. Y. Supp. 47, rev'g 69 Misc. 38, 125 N. Y. Supp. 691.

The provisions of the Veteran Acts, which require that if the position held by a veteran shall be abolished, he shall not be discharged, but shall be

transferred to some other position in the same department which he may be fit to fill, receiving the same compensation therefor, necessarily implies that a vacancy must exist in the new position, and does not require the creation of a vacancy by the removal of another incumbent. Accordingly, where a veteran appointed by the trustees of Bellevue and allied hospitals to inspect the construction of a particular hospital, was discharged when the work was finished, so that an inspector was no longer necessary, he could not compel the board to transfer him to a similar position in another building which was filled by another inspector. *Barton v. Brennan*, 141 App. Div. 295, 126 N. Y. Supp. 47, rev'g 69 Misc. 38, 125 N. Y. Supp. 691.

To same effect see *People ex rel. Forest v. Williams*, 140 App. Div. 723, 125 N. Y. Supp. 583; *Cottam v. City of New York*, 131 N. Y. Supp. 617.

Remedies for wrongful removal of veterans and volunteer firemen.

The failure of a veteran or volunteer fireman to assert the privilege conferred by the statute at a time when it should have been asserted, constitutes a waiver thereof. So held of the failure of an employee of a department upon an informal hearing of charges to call the attention of the commissioner to his claim to the protection of the statute. *People ex rel. Cattermole v. Bensel*, 121 App. Div. 478, 106 N. Y. Supp. 110, aff'd 190 N. Y. 526; *People ex rel. Robesch v. President of Borough*, 190 N. Y. 497, rev'g 121 App. Div. 229, 105 N. Y. Supp. 607; *People ex rel. O'Brien v. Porter*, 90 Hun, 401, 35 N. Y. Supp. 811.

Where an employee of the election board when asked to resign, stated to its president that he would not resign and that he could not be removed except upon written charges and a hearing before the board; held that his failure to state in terms that he was a veteran, under these circumstances, was not a waiver as matter of law of the protection of the Veteran Acts, but that the question whether he had stated enough to put the removing officer upon inquiry respecting his rights as a veteran was one of fact to be submitted to the jury. *People ex rel. Ross v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371, rev'g 61 Misc. 358; 113 N. Y. Supp. 246.

The remedy by certiorari to review the removal of a veteran, extends not only to questions of jurisdiction, but to the sufficiency of the charges and of the evidence and to the weight or preponderance of the evidence, and to the question whether any rule of law affecting the rights of the relator has been violated to his prejudice. *People ex rel. Long v. Whitney*, 143 App. Div. 17, 127 N. Y. Supp. 554.

Where the removal of a veteran is annulled on certiorari for errors in the receipt or consideration of incompetent evidence, or other action prejudicial to the relator's right to a fair and impartial trial, and is not intended as a final determination of the charges on the merits, which would preclude a rehearing thereof under pain of punishment for contempt, the court may reinstate the relator and remit the matter to the body, board or officer whose determination is under review for further consideration or for a rehearing,

which may be on the same charges or on a renewal thereof, or on those and additional charges. *People ex rel. Long v. Whitney*, 143 App. Div. 17, 127 N. Y. Supp. 554.

It seems, moreover, that without any direction in the order there may be a rehearing on the same charges after the annulment of a determination removing an employee, where the annulment is not upon the merits. *People*

application for the writ. *People ex rel. Dellett v. Board of Health*, 56 Misc. 28, 106 N. Y. Supp. 923.

A writ of prohibition will not be granted to restrain the head of a department from trying charges against an employee thereof, on the ground that such employee is a veteran and his rights under the statute will be invaded. The Civil Service Law gives a veteran a remedy by certiorari to review the action of the head of the department in removing a subordinate without cause. *People ex rel. Crowley v. Butler*, 53 Misc. 366, 103 N. Y. Supp. 329.

The provision of the statute giving a veteran a right of action against the removing officer for wrongful removal, becomes operative only after the veteran has compelled reinstatement by appropriate proceedings. A veteran who fails to institute proceedings for his reinstatement, cannot maintain the action unless for some cause beyond his control, reinstatement proceedings would be ineffectual. *Hilton v. Cram*, 112 App. Div. 35, 97 N. Y. Supp. 112; distinguished in *Bean v. Clausen*, 113 App. Div. 129, 99 N. Y. Supp. 44.

Where the position of a veteran was abolished in bad faith, and proceedings to compel reinstatement had become impossible, because jurisdiction over the department where the veteran was employed, had been transferred to another department, *held*, that the veteran could maintain an action for damages against the removing officer without instituting proceedings for reinstatement. *Bean v. Clausen*, 113 App. Div. 129, 99 N. Y. Supp. 44.

The cause of action for damages against the head of a department under § 20 of the Civil Service Law for denying to a veteran the preference to employment conferred by law, survives the death of the veteran and may be instituted by his representative. *Burke v. Holtzmann*, 117 App. Div. 292, 102 N. Y. Supp. 162; *aff'd* 196 N. Y. 576.

The comptroller; general duties; settlement of claims; assent to certain contracts required; election; salary.
(See 3d Ed., p. 106.)

§ 149. The department of finance shall have control of the fiscal concerns of the corporation. All accounts rendered to or kept in the other departments shall be subject to the inspection and revision of the officers of this department. It shall prescribe the forms of keeping and rendering all city accounts, and, except as herein otherwise provided, the manner in which all salaries shall be drawn, and the mode by which all creditors, officers and employees of the corporation shall be paid. All payments by or on behalf of the corporation, except as otherwise specially provided, shall be made through the proper disbursing officer of the department of finance, on vouchers to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller, and countersigned by the mayor. The comptroller may require any person presenting for settlement an

account or claim for any cause whatever, against the corporation, to be sworn before him or before either of the deputy comptrollers, touching such account or claim, and when so sworn, to answer orally as to any facts relative to the justness of such account or claim. Willful false swearing before the comptroller or deputy comptrollers is perjury and punishable as such. He shall settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor; but in adjusting and settling such claims, he shall, as far as practicable, be governed by the rules of law and principles of equity which prevail in courts of justice. No claim against the city or against any of the counties contained within its territorial limits, or payable in the first instance from moneys in the city treasury for services rendered or work done or materials or supplies furnished except (1) claims reduced to judgment, or (2) awards, costs, charges and expenses duly taxed or ordered paid in judicial proceedings, or (3) claims arising under the provisions of contracts made at public letting in the manner provided by section four hundred and nineteen of this act, or (4) claims settled and adjusted by the comptroller, pursuant to the authority of this section, shall be paid unless an auditor of accounts shall certify that the charges therefor are just and reasonable; and, except as hereinbefore otherwise provided, all contracts with the city or any of such counties or with any public officer acting in its or their behalf, shall be subject to such audit and revision by the department of finance. The power hereby given to settle and adjust such claims shall not be construed to authorize the comptroller to dispute the amount of any salary established by or under the authority of any officer or department authorized to establish the same, nor to question the due performance of his duties by such officer, except when necessary to prevent fraud. If in any action at law against The City of New York to recover upon a claim not embraced within the exceptions hereinabove numerically specified, the amount claimed by the plaintiff is in excess of the amount as audited and settled by the department of finance, the plaintiff must establish his claim by competent evidence of value, and no testimony shall be admitted to show a promise or agreement by any officer or employee of the city or of any of the counties contained within its territorial limits, to pay any larger sum than the amount so audited or allowed by the department of finance. The comptroller shall not reduce the rate of interest upon any taxes or assessments below the amount fixed by law. No contract hereafter made, the expense of the execution of which is not by law or ordinance, in whole or in part, to be paid by assessments upon the property benefited, shall be binding or of any force, unless the comptroller

shall endorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same, provided, however, that in contracts for the purchase of coal to be delivered within a period of one year from the date thereof, the comptroller shall endorse thereon his certificate that there remains unexpended and unapplied as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract in so far as the same is to be executed during the current year, as certified by the officer making the same and upon the first of the following year the comptroller shall certify as herein provided as to the portion of such contract then unexecuted and such certification by the comptroller shall make any such contract for coal binding and of full force. But this provision shall not apply to work done, or supplies furnished, not involving the expenditure of more than one thousand dollars, unless the same is required by law to be done by contract at public letting. It shall be the duty of the comptroller to make such indorsement upon every such contract so presented to him, if there remains unapplied and unexpended such amount so specified by the officer making the contract, and to thereafter hold and retain such sum to pay the expense incurred until the said contract shall be fully performed. And such indorsement shall be sufficient evidence of such appropriation or fund in any action. The comptroller shall furnish to each head of department, monthly, a statement of the unexpended balances of the appropriation for his department. Wages and salaries, except as otherwise provided in this act, may be paid upon pay rolls, upon which each person named thereon shall separately receipt for the amount paid to such person, and in every case of payment upon a pay roll the warrant for the aggregate amount of wages and salaries included therein may be made payable to the superintendent, foreman or other officer designated for the purpose. The comptroller shall enter into, upon behalf of The City of New York, any lease authorized by the commissioners of the sinking fund of property leased to the city. The assent of the comptroller shall be necessary to all agreements hereafter entered into by any city officer, board, commission or department for the acquisition by purchase of any real estate or easement therein, when such an agreement involves an obligation to pay or an expenditure of any money on behalf of the city, and in any proceedings that may hereafter be had to acquire real estate or hereditaments for or on behalf of the corporation of The City of New York, before an award shall be confirmed, imposing

an obligation upon the city to pay any moneys, the comptroller shall have thirty days' notice in writing, stating before whom and at what time such proceeding will take place, but nothing hereinbefore contained shall affect the board of rapid transit railroad commissioner existing under chapter four of the laws of eighteen hundred and ninety-one as amended. The comptroller of The City of New York shall be elected and hold office as provided in this act, and shall receive an annual salary of fifteen thousand dollars, and shall account to and pay into the city treasury all fees and emoluments to which he may be entitled under the general tax law of the state of New York and all other statutes, whether general or special. (*As amended by L. 1910, ch. 545.*)

Examination of claimants.

The right of the comptroller, to examine any person presenting for settlement, an account or claim against the city, terminates with the commencement of an action based upon said claim. *City of New York v. Weil*, 63 Misc. 188, 118 N. Y. Supp. 465.

Query: Whether a claimant who contumaciously and willfully refuses to comply with the comptroller's requirement that he attend for examination, can be deemed to have presented his claim to the comptroller within the provisions of § 261, *post*, prohibiting the bringing of an action against the city until thirty days after the presentation of the claim to the comptroller. *City of New York v. Weil*, 63 Misc. 188, 118 N. Y. Supp. 465.

Audit of claims.

The general scheme of the charter is that all claims against the city, unless provision be otherwise made, must first be audited by auditors under § 151, *post*, and when so audited a warrant is to be drawn upon the chamberlain signed by the comptroller and countersigned by the mayor. *People ex rel. O'Brien v. Butler*, 120 App. Div. 751, 105 N. Y. Supp. 631.

The comptroller of the city of New York is the fiscal officer of the board of education for the purpose of presentation of a claim so as to determine the right to costs under Code Civ. Pro., § 3245. *Eagan v. Board of Education*, 115 N. Y. Supp. 167.

The tenement house commissioner has no power to audit or pay the salary of an employee of his department, since by the charter that power is vested in the finance department alone and therefore the commissioner cannot be compelled by mandamus to act upon the claim for salary alleged to be due to an employee of the department. *People ex rel. O'Brien v. Butler*, 120 App. Div. 751, 105 N. Y. Supp. 631.

A person who knowingly, with intent to defraud, presents to the comptroller for audit or allowance, any fraudulent claim, is guilty of a felony

under § 672 of the Penal Code, and a conspiracy to do so is within the purview of subd. 4 of § 168 of the Penal Code, making it a crime for two or more persons to conspire to cheat or defraud another out of property by means which are in themselves criminal or which, if executed, would amount to a cheat. *People v. Miles*, 123 App. Div. 862, 108 N. Y. Supp. 510, aff'd 192 N. Y. 541.

Effect of audit on contract for less than \$1,000.

Under the provisions of this section, when read in connection with § 419 *post*, a contract made by a department without public letting, for the performance of work for a fixed sum, is legally equivalent to an agreement to pay *quantum meruit*. If the auditor thinks the work worth less than the contract price "the plaintiff must establish his claim by competent evidence of value." The contract price does not give the plaintiff a favorable presumption, nor can it ever be used as evidence tending to support his cause, for "no testimony shall be admitted to show a promise . . . to pay any larger sum than the amount so audited or allowed by the department of finance." If the sum named in the contract can be proved at all, it can only be, as would seem from the language of the charter, by the city in defense as putting a maximum limit upon the *quantum meruit*. *Smith Contracting Co. v. City of New York*, 70 Misc. 132, 128 N. Y. Supp. 351, aff'd 146 App. Div. 760, 131 N. Y. Supp. 479.

Certificate by head of department of estimated expense of executing contract.

The provision of this section requiring the head of a department to certify to the comptroller the estimated expense of executing contracts, operates to limit the expenditures which may be lawfully incurred to the estimate contained in such certificate. Accordingly, where the borough president of Brooklyn certified to the comptroller, the estimated expense of removing refuse from the sewers of Brooklyn, and the actual quantity removed exceeded the estimated quantity, it was held that the contractor could not recover from the city for the removal of such excess, though the same was removed pursuant to a written order of the borough president. *Donlon v. Contracting Co. v. City of New York*, 64 Misc. 471, 119 N. Y. Supp. 617.

Certificate of funds applicable to contract.

The duty imposed upon the comptroller by this section of executing a certificate that there are funds applicable to pay the estimated expense of a contract, becomes purely ministerial, where there actually is a sufficient fund applicable to the payment of the contract. Should the comptroller in such a case refuse to act, mandamus will lie to compel him to issue the certificate. *Beckwith v. City of New York*, 121 App. Div. 462, 106 N. Y. Supp. 175.

After the award of a contract to the lowest bidder, the head of a department has no power to rescind the contract and reject all bids on the ground that the comptroller has not certified that there is a fund applicable to payment if in fact such a fund exists and the certificate was not issued merely

because the contract was never presented to the comptroller for certification. *Beckwith v. City of New York*, 121 App. Div. 462, 106 N. Y. Supp. 175.

Where the board of aldermen, pursuant to the provisions of § 419, *post*, authorized the making of a supplementary contract for extra work with the original contractor and before the execution of the supplementary contract, the original contract was repudiated by the city upon the ground of unreasonable delay, *held*, that the surety of the contractor completing the work upon demand of the city could recover upon the contract and the fact that there was no appropriation for the cost of the work when the supplementary contract was made did not defeat the surety's right to recover where all requirements in that respect were complied with before the work was actually completed. *O'Rourke Const. Co. v. City of New York*, 140 App. Div. 498, 125 N. Y. Supp. 664.

Settlements of suits.

Where a contractor had been awarded a contract to lay asphalt block pavement, and the pavement so laid, turned out to be defective, and the balance of the contract price amounting to over \$1,000 had been withheld by the city authorities. *Held*, that the city authorities had no power to enter into an agreement with the said contractor authorizing him to repave the street with sheet asphalt, for the amount of the balance, which would have been payable under the original contract. The agreement cannot be upheld on the theory that it was made by the comptroller under this section, in settlement of a suit brought by the contractor against the city to recover the balance on the original contract. *Cahn v. Metz*, 115 App. Div. 516, 101 N. Y. Supp. 392.

Compelling payment of debts by mandamus.

Mandamus will not lie to compel the comptroller to pay money to which the relator is entitled as matter of law, unless the mayor has been made a party to the proceeding. *People ex rel. McClinchie v. Prendergast*, 140 App. Div. 235, 125 N. Y. Supp. 99.

Mandamus will not lie to compel the payment of an unliquidated demand against the city which is contested by the comptroller. *People ex rel. Dady v. Coler*, 171 N. Y. 373; *People ex rel. Dunn v. Metz*, 115 App. Div. 269, 100 N. Y. Supp. 913; *Matter of Morris & Cummings Dredging Co.*, 116 App. Div. 257, 101 N. Y. Supp. 726.

The comptroller cannot refuse to pay a judgment rendered against the Board of Education upon the ground that there is no appropriate fund devoted to that purpose. Although the suit is brought against the Board of Education as a separate corporation, The City of New York is the custodian of its funds and must pay judgments rendered against it when the Board of Education has taken the necessary steps to procure its payment. Section 188, *post*, seems to give the comptroller power to raise these funds even though the judgment has not in form been rendered against the city.

Matter of Simpson v. Prendergast, Sp. T., Lehman, J., N. Y. L. Jour., July 19th, 1911. See same case digested under sec. 255, *post*.

Comptroller to appoint two deputy and one assistant deputy comptrollers. (See 3d Ed., p. 111.)

§ 150. The comptroller shall appoint and for cause to be stated in the City Record at pleasure remove two deputy comptrollers and an assistant deputy comptroller. The said deputy comptrollers shall, in addition to their other powers, possess any or every power and perform any or every duty belonging to the office of comptroller, whenever the said comptroller shall, by due written authority and during a period of time not extending beyond three months, nor beyond his term of office, and to be specified in such authority, designate and authorize the said deputy comptrollers, or either of them, to possess such powers and perform such duties, and such designation and authority shall be duly filed in and remain of record in the department of finance and in the mayor's office. The said deputy comptrollers shall possess the like authority in case of the disability of the comptroller upon the like designation of the mayor which shall be filed and remain of record as aforesaid; but such authority derived from a designation from the comptroller or the mayor may at any time be terminated in the same manner as it was created. The comptroller may designate and authorize the assistant deputy comptroller, and, when he deems it necessary, any clerk, to sign in his own name and in the place of the comptroller, warrants drawn upon the city chamberlain. A warrant so signed by the assistant deputy comptroller, or by such clerk, duly designated, shall be of the same force and effect as if signed by the comptroller. Such designation or designations of the assistant deputy comptroller and such clerk shall be in writing signed by the comptroller and in duplicate and shall be duly filed and remain of record in the department of finance and in the mayor's office. The period for which each of said designations shall continue in force shall be specified therein and shall not be longer than three months nor extend beyond the term of office of the comptroller and may be terminated by the comptroller at any time by the filing in the department of finance and in the mayor's office of a notice of such termination signed by the comptroller. (*As amended by L. 1911, ch. 607.*)

§ 151. Bureaus of the department of finance. (See 3d Ed., p. 112.)

Audit of claims.

See cases cited under § 149, *ante*.

Markets.

A market in the space between Pitt and Willet streets under the Manhattan bridge, though not formally declared such by the municipal authorities, comes within the jurisdiction of the comptroller and officers of the finance department, under the provision of this section, and is not within the jurisdiction of the commissioner of bridges. *Sorgen v. Prendergast*, 68 Misc. 189, 123 N. Y. Supp. 765.

After the comptroller and the commissioners of the sinking fund have consented without reservation to the assignment of a stall privilege, they cannot in the permit issued to the assignee limit his rights by prohibiting him from engaging in a business authorized under the permit of his assignor. Mandamus will lie in such a case to compel the comptroller to issue to the assignee a permit of the same character and scope as the permit of the assignor. *People ex rel. Dansiger v. Metz*, 123 App. Div. 269, 107 N. Y. Supp. 970.

Dedication of certain lands for markets. (See 3d Ed., p. 119.)

§ 163. The lands in the ninth ward of that part of the corporation heretofore known as the mayor, aldermen and commonalty of The City of New York, bounded on the north by Bloomfield street, on the south by Gansevoort street, on the east by West street and Tenth avenue, and on the west by Thirteenth avenue, being a portion of the lands heretofore set apart by law for use as a market place, are hereby dedicated to market purposes, and shall be used and occupied as such in the manner that may be designated and prescribed by the commissioners of the sinking fund, who shall have full power and authority in respect thereto. Said commissioners of the sinking fund may, in their discretion, lease said lands to be used for public market purposes for such term of years, with such covenants, and for such annual rentals, as in their judgment shall be for the best interests of the city, or may prepare the same for use as a public market. The block of ground in said ward bounded on the north by Little Twelfth street, on the south by Gansevoort street, on the east by Washington street, and on the west by West street and Tenth avenue, is hereby declared to be a public market place, and subject to the provisions of section two hundred and five of this act, shall be kept for the exclusive use of farmers and market gardeners. Any farmer or market gardener, desiring to use such market, or the market in the borough of Brooklyn known as the Wallabout farmers' market, may present to the department of finance an affidavit, stating his name, residence, occupation and a general description of the commodities which he desires to sell in any such market, together with a request that a license be issued to him to use the same. On the filing of such affidavit and the payment of a

nominal fee sufficient to defray the cost of issuing said license the department of finance, if satisfied that such applicant is a proper person, shall issue to him a license to use such market for a period not to exceed one year. Such licenses shall be numbered, and registered in the department of finance, and the department of finance shall issue to such licensee a metallic tag or plate, with the number of such license thereon. Such tag or plate shall be of convenient form and suitable design, approved by the department of finance. No person shall be permitted to use any such market except he be a holder of one of said licenses, and while using such market shall at all times cause to be conspicuously displayed the tag or plate containing the number of his license. The department of finance shall have sole charge and control of any such public market place and of the wagons employed in the business of selling farm and garden produce in said city, and shall

ch. 888.)

Markets.

A market in the space between Pitt and Willet streets under the Manhattan bridge, though not formally declared such by the municipal authorities, comes within the jurisdiction of the comptroller and officers of the finance department, under the provision of this section, and is not within the jurisdiction of the commissioner of bridges. *Sorgen v. Prendergast*, 68 Misc. 189, 123 N. Y. Supp. 765.

After the comptroller and the commissioners of the sinking fund have consented without reservation to the assignment of a stall privilege, they cannot in the permit issued to the assignee limit his rights by prohibiting him from engaging in a business authorized under the permit of his assignor. Mandamus will lie in such a case to compel the comptroller to issue to the assignee a permit of the same character and scope as the permit of the assignor. *People ex rel. Danziger v. Metz*, 123 App. Div. 269, 107 N. Y. Supp. 970.

Dedication of certain lands for markets.

such market shall at all times cause to be conspicuously displayed the tag or plate containing the number of his license. The department of finance shall have sole charge and control of such public market place and of the wagons employed in the business of selling farm and garden produce in said city, and shall have power to make suitable regulations concerning fees, the hours during which the said business shall be conducted, and the general management of the same. (*As amended by L. 1912, ch. 396.*)

AND SHALL, ON THE MAKING OF SUCH ASSIGNMENT AND THE PAYMENT OF A

nominal fee sufficient to defray the cost of issuing said license the department of finance, if satisfied that such applicant is a proper person, shall issue to him a license to use such market for a period not to exceed one year. Such licenses shall be numbered, and registered in the department of finance, and the department of finance shall issue to such licensee a metallic tag or plate, with the number of such license thereon. Such tag or plate shall be of convenient form and suitable design, approved by the department of finance. No person shall be permitted to use any such market except he be a holder of one of said licenses, and while using such market shall at all times cause to be conspicuously displayed the tag or plate containing the number of his license. The department of finance shall have sole charge and control of any such public market place and of the wagons employed in the business of selling farm and garden produce in said city, and shall have power to make suitable regulations concerning fees, the hours during which the said business shall be conducted, and the general management of the same. (*As amended by L. 1907, ch. 365.*)

Authority to recommend retirement of employees after thirty years' service. (See 3d Ed., p. 123.)

§ 165. Any member of the board of estimate and apportionment is hereby authorized, whenever in his judgment it shall be to the interest of the public service, to recommend to said board the retirement from active service of any officer, clerk or employee who shall have been in the employ of The City of New York or of any of the municipalities, counties or parts thereof which have been incorporated into The City of New York for a period of thirty years and upwards and who shall have become physically or mentally incapacitated for the further performances of the duties of his position. The term of service, however, shall not be affected by any change in title, duty or salary or by any promotion or by any vacation or leave of absence or by any temporary disability by reason of sickness or accident or by any transfer from one department or office to another department or office during the period of service, or by any change of any of the boards, bureaus or departments in which service shall have been performed from an office paid by fees to a salaried office. But this section shall not apply to any person who is, or may be, entitled to share in the police pension fund, or in the fire department relief fund, or in the public school teachers' retirement fund, or in the health department pension fund, or in the retirement fund of the College of The City of New York. (*As amended by L. 1911, ch. 669.*)

Authority of board of estimate to retire employees. (See 3d Ed., p. 123.)

§ 166. The board of estimate and apportionment is hereby authorized and empowered to retire from active service any person recommended for retirement, as provided by section one hundred and sixty-five of this act. Reasonable notice of its proposed action shall be given by said board to any person intended to be retired and an opportunity of making an explanation shall be given to such person. The board shall state its reasons for retiring any such person and that the interests of the public service requires such retirement. (*As amended by L. 1911, ch. 669.*)

Annuities to retire employees. (See 3d Ed., p. 124.)

§ 167. Any person retired from active service pursuant to sections one hundred and sixty-five and one hundred and sixty-six of this act shall be awarded and granted by the board of estimate and apportionment an annual sum or annuity to be fixed by said board not exceeding, however, one-half of the amount which his annual salary or compensation averages for the period of three years immediately prior to the time of his retirement. The comptroller shall pay the annuities granted in monthly installments out of the receipts of excise moneys or liquor taxes belonging to The City of New York as constituted by this act. Such payments to continue during the lifetime of the person or persons so retired. (*As amended by L. 1911, ch. 669.*)

Corporate stock of The City of New York; how issued; provisions as to bonded indebtedness. (See 3d Ed., p. 125.)

§ 169. All bonds issued by The City of New York on and after January first, eighteen hundred and ninety-eight, in pursuance of laws already passed or which may hereafter be passed, or in pursuance of the provisions of this act, excepting assessment bonds, revenue bonds, certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven of this act, shall be known as "corporate stock of The City of New York." For the redemption and payment of said corporate stock and the interest thereon, the faith and credit of The City of New York shall be and is hereby pledged. Such corporate stock shall be in such form as may be designated by the comptroller, and shall be signed by the said comptroller and the mayor of The City of New York, and sealed with the

common seal of The City of New York, and attested by the city clerk. Such corporate stock shall be in coupon form in sums not less than five hundred dollars each share, or shall be registered, except as hereinafter provided, and shall be conditioned to be paid in gold coin, or in the legal currency of the United States, at the option of the commissioners of the sinking fund, except as hereinafter provided, and shall be made redeemable at a period of not more than fifty years from the date thereof. The commissioners of the sinking fund may, in their discretion, provide that such corporate stock shall be redeemable, before maturity at its face value with accrued interest, at the option of the said commissioners, after such date as said commissioners may determine and cause to be set forth in such certificates of corporate stock. Such corporate stock and all assessment bonds, revenue bonds, certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven of this act, as well as all bonds hereafter to be issued by The City of New York, by virtue of this act or of any other act, whether general or special, shall be free and exempt from all taxation, except for state purposes. The interest on such corporate stock and on all other bonds of the corporation, except revenue bonds, bills or notes, certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of sections one hundred and eighty-seven and one hundred and eighty-nine of this act, shall be at such a rate as the board of commissioners of the sinking fund may prescribe, and shall be made payable quarterly or semi-annually in The City of New York, or at such other place as may be fixed by the said comptroller, at the time of issue of said stock or bonds; provided, however, that the interest on certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of sections one hundred and eighty-seven and one hundred and eighty-nine of this act may be made payable at the date of maturity thereof or at such time or times as the comptroller in his discretion may designate. Such corporate stock may be authorized to be issued by the board of estimate and apportionment without the concurrence or approval of any other board or public bids for the following purposes, and within the following limitations:

1. For the purposes specified in section one hundred and seventy of this act;
2. For the purposes specified in section one hundred and seventy-four of this act;
3. For the purposes specified in section one hundred and seventy-six of this act;

4. For the purposes specified in section one hundred and eighty-four of this act;
5. For the purposes specified in section two hundred and thirty-five of this act;
6. For the purposes specified in section four hundred and twenty-two of this act;
7. For the purposes specified in section one hundred and seventy-eight of this act, to an amount not exceeding two million dollars in any one calendar year;
8. To pay the awards, costs, charges and expenses of acquiring title to lands required for public purposes and which have been or may hereafter be authorized by or pursuant to law;
9. For constructing and equipping school buildings and acquiring sites therefor to an amount not exceeding three million five hundred thousand dollars, in any one calendar year;
10. For the repaving of streets to an amount not exceeding three million dollars, in any one calendar year;
11. For the improvement of parks, parkways and drives, to an amount not exceeding five hundred thousand dollars, in any one calendar year.

Corporate stock to be issued for purposes other than those hereinbefore in this section specifically enumerated, or for such purposes in excess of the amounts therein specified, shall be authorized by the board of aldermen, with the approval of the board of estimate and apportionment, as provided by section forty-seven of this act; provided, however, that wherever by existing provisions of law the commissioners of the sinking fund may be specifically authorized to provide for the issue of stocks or bonds, said authorization of the comptroller shall be made by said commissioners instead of said board of estimate and apportionment; and that nothing in this section contained shall affect the provisions of sections one hundred and eighty and two hundred and thirteen of this act; provided, however, that nothing in this section shall prevent the issue of general fund bonds in the manner provided by section two hundred and twenty-two of this act. The city of New York shall not, except as hereinafter provided, expend any part of proceeds of sales of corporate stock for the purpose of paying operating expenses of said city as hereinafter defined. The term "operating expenses," as used in this section, includes expenses for maintenance, repairs and current operation or administration of the property and government of the city; and excludes expenditures by the city for betterments, improvements and acquisitions of property of a permanent nature; but ex-

penditures made or incurred by the board of water supply, the aqueduct board, and, prior to January 1, 1910, by the department of docks shall not be considered operating expenses within the meaning of this act. When in the opinion of the comptroller it shall appear desirable to have the whole or any part of an issue of corporate stock made payable in the currency of a country other than the United States, such corporate stock so to be sold shall be made payable in such currency, with certificates in such amounts, and sold in such manner as may be duly authorized by the commissioners of the sinking fund; provided, however, that in case such corporate stock payable in a foreign currency or currencies is not sold in the manner prescribed for the sale of corporate stock under the provisions of section one hundred and eighty-two of this chapter, the comptroller shall invite sealed, competitive tenders, for the purchase of such corporate stock in such manner as the commissioners of the sinking fund shall prescribe; and he shall make award or awards to the highest bidder or bidders for such corporate stock with the full power to reject all bids. The proceeds of sales of such corporate stock shall be recorded in the books of the finance department in the terms of the currency of the United States as well as in the terms of such foreign currency in which such corporate stock shall have been issued. (*As amended by L. 1911, ch. 456.*)

The general fund bonds issued under § 222, *ante*, are to be classified with the city's corporate stock, as the faith and credit of the city are pledged for the fulfillment of their obligation. When held by the sinking fund they are the subject of deduction, in the computation of the permanent debt of the city, with other sinking fund holdings. *Levy v. McClellan*, 196 N. Y. 179, *aff'g* 132 App. Div. 913, 116 N. Y. Supp. 1087.

Issue of stock or bonds by The City of New York to take the place of bonds authorized to be issued by laws enacted prior to January first, eighteen hundred and ninety-eight. (See 3d Ed., p. 127.)

§ 170. Whenever, and to the extent to which, it may be lawful for the municipal or public corporations of parts thereof, including the counties of Kings and Richmond, which by this act are made part of the corporation of The City of New York, to issue for public purposes bonds pursuant to laws enacted prior to January first, eighteen hundred and ninety-eight, it shall be lawful for The City of New York, as hereby constituted, to issue corporate stock as herein provided for the same purposes; provided, however, that the amount so to be issued shall not in any one case exceed the balance remaining unissued of the amount limited to be issued pursuant to the authority

of said laws. In similar instances assessment bonds and certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven of this act of The City of New York, as hereby constituted, may likewise* to be so issued, subject to the same limitations as to the amount thereof. (*As amended by L. 1910, ch. 683.*)

Funds for street and park openings. (See 3d Ed., p. 129.)

§ 173. The fund heretofore established and accumulated in the treasury of the corporation known as the mayor, aldermen and commonalty of The City of New York, entitled the "fund for street and park openings," shall be continued in the corporation of The City of New York, as hereby constituted. The said fund for street and park openings shall consist of:

1. Whatever cash balance in said fund may upon January first, eighteen hundred and ninety-eight, be on deposit in the treasury of the corporation known as the mayor, aldermen and commonalty of The City of New York.

2. Whatever cash balances there may be upon January first, eighteen hundred and ninety-eight, in the treasuries or standing to the credit of the several municipal or public corporations or parts thereof which by this act are made part of the corporation of The City of New York and which said cash balances may be applicable to the payment of damages awarded by the commissioners of estimate and assessment in reports heretofore confirmed or hereafter to be confirmed, in proceedings taken to open any street, road, avenue, boulevard, public square or place, park or parkway, or to acquire title to land required for any bridge, tunnel or approach thereto, and all the costs and expenses of such proceedings heretofore or hereafter taxed.

3. Such sums as may be raised by taxation in The City of New York, and the proceeds of such bonds as may be issued as by this act provided to meet the expense, in whole or in part, of any of the objects and purposes in the preceding subdivision of this section specified.

4. All money hereafter collected by The City of New York, as hereby constituted, for or on account of assessments made and confirmed and hereafter to be made and confirmed for opening any street, road, avenue, boulevard, public square or place, park or parkway, or for acquiring title to land required for any bridge, tunnel or approach thereto, wholly or partly within the limits of the several municipal or public corporations or parts thereof, which by this act, are made part of the corporation of The City of New York.

* So in original.

5. All moneys received from the sale of street and park opening assessment bonds or certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven of this act issued and sold under authority of section one hundred and seventy-four of this act. All such street and park opening assessment bonds shall when due be paid from the said fund for street and park openings and in case the said fund shall be insufficient for that purpose, it shall be lawful for the comptroller when thereto authorized by the board of estimate and apportionment, without the concurrence or approval of any other board or public body to issue corporate stock of The City of New York for an amount sufficient to pay the street and park opening assessment bonds so falling due, as aforesaid; or the comptroller may, in his discretion, for such purpose, issue street and park opening assessment bonds in the manner provided in section one hundred and seventy-four of this act. (*As amended by L. 1910, ch. 683.*)

Damages, et cetera, to be paid from fund for street and park openings. (See 3d Ed., p. 130.)

§ 174. From the said fund for street and park openings, and not otherwise, shall be paid all damages awarded by the commissioners of estimate and assessment in reports hereafter or heretofore confirmed in proceedings taken to open any street, road, avenue, boulevard, public square or place, park or parkway, or to acquire title to land required for any bridge, tunnel, or approach thereto in The City of New York, as hereby constituted, and all the costs and expenses of such proceedings heretofore or hereafter taxed. The person or persons to whom awards shall be made in such proceedings, wherein reports are or have been confirmed, and the person or persons in whose favor costs and expenses may be or have been taxed, shall not have an action at law against The City of New York for such awards, costs or expenses, but may require the officers of said city to raise, as hereafter provided, the money necessary to enable the comptroller to pay such awards, costs and expenses from the said fund, and thereafter compel the payment of such damages, costs and expenses from such fund. Whenever the amount of the damages awarded in any report, together with the costs of the commissioners and the charges and expenses, shall exceed the balance remaining in said fund after deducting all outstanding claims against said balance, the comptroller is authorized to raise by the issue and sale of certificates of indebtedness and other evidences of indebtedness to be redeemed out of the tax levy for the year next succeeding the year of their issue or in his discretion to raise by the issue and sale

of street and park opening assessment bonds at not less than par for such periods as he may determine not exceeding ten years and bearing interest at such a rate as the board of commissioners of the sinking fund may prescribe, such amounts as shall be necessary to pay such damages, costs and expenses, but not to exceed the amount of assessments remaining uncollected and a lien upon lands assessed for the benefit of street and park openings added to the amount of the assessments that remain to be imposed in proceedings in which the awards only have been confirmed; provided, however, that in each and every case in which by virtue of any existing statute or any statute hereafter enacted, or by virtue of any act or resolution heretofore or hereafter adopted by any board or body pursuant to any statute, the whole or any portion of the awards made in any proceeding, and of the costs and expenses thereof, are payable out of the fund for street and park openings and are not to be assessed upon the property benefited, but are to be borne and paid by The City of New York, the board of estimate and apportionment may, in its discretion, direct that the amount so to be borne and paid by said City of New York shall be raised by the issue and sale of corporate stock of The City of New York, and the comptroller shall thereupon issue and sell said stock at such times and in such amounts as may be necessary, and shall pay the proceeds thereof into said fund for street and park openings. (*As amended by L. 1910, ch. 683.*)

Replenishment of said fund. (See 3d Ed., p. 131.)

§ 175. The corporation counsel shall furnish to the board of estimate and apportionment in each year, at the time of making the estimate for the ensuing year, a list of all reports confirmed for the twelve preceding months with a statement of the amount of awards and costs taxed in each proceeding. The comptroller shall at the same time furnish to the said board statements of the amount of such awards and costs already paid, and of the amounts due for awards and costs payable from the said fund and still unpaid, and of the amounts of revenue bonds, certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven of this act then outstanding, issued in pursuance to the last preceding section, and of the balance in the treasury to the credit of the said fund. The board of aldermen and the said board shall thereupon include in the annual budget for the ensuing year a sum sufficient, with such balance, to pay all claims for the awards and costs in all proceedings in which reports shall have been prior to that time confirmed, and which awards shall not then have been paid, and also a sum sufficient to pay and dis-

charge the revenue bonds, certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven of this act then outstanding and issued in pursuance of the last preceding section. (*As amended by L. 1910, ch. 683.*)

Expenses of the department of docks and ferries; how met.

(See 3d Ed., p. 133.)

§ 180. The comptroller shall, from time to time, when authorized by the board of estimate and apportionment on the recommendation of the commissioners of the sinking fund, issue corporate stock of The City of New York in such amounts as they may deem the public interests to demand, but not exceeding five million dollars in any one calendar year, for the purpose of raising the money necessary to carry out the provisions of title one of chapter sixteen of this act, relating to the department of docks and ferries, its powers and duties. In case the public interests demand the issue of such bonds to an amount exceeding the sum of five million dollars in any one calendar year, the approval and authority of the board of aldermen shall be obtained therefor in the manner provided for by sections forty-seven and forty-eight of this act. The moneys received from sales of such stocks shall be deposited in the treasury of the city and shall be drawn out and paid by the comptroller of said city for the several objects and purposes provided in said title, relating to the said department, its powers and duties, upon the requisition of the board of docks; provided, however, that the commissioners of the sinking fund may specify from time to time in such detail as may seem to them proper the purposes to which the proceeds of the sale of such stocks shall be applied, and it shall thereupon be unlawful for the board of docks to incur any liability or expense in excess of any appropriation thus made. The expenses and compensation of said board, its rents, the compensation of its appointees, the purchase money and damages awarded upon the acquisition of private property, the payments under the contracts authorized in said title and for work performed under the same, and all other expenses and disbursements necessarily incurred, in carrying out the said provisions of said title in keeping, maintaining, repairing, building and rebuilding the wharves belonging to the said corporation, in dredging and cleaning slips, in acquiring on behalf of the city real estate, property, plant or appliances required for the equipment, maintenance or operation of any ferry, or for terminal facilities or approaches thereto, upon the water front of the borough of Richmond or upon the water front of the borough of Brooklyn, between Thirty-eighth street and

Sixtieth street, except operating expenses made or incurred after December thirty-first, nineteen hundred and nine, shall be paid out of said moneys in the manner above provided. The limitation upon the annual expenditure in this section shall not apply to expenditure made on account of the equipment, maintenance or operation of any such ferry, or on account of the acquisition of property therefor, but the maximum sum mentioned may be expended annually for the other purposes and in the manner specified in said section. Operating expenses of the department of docks after December thirty-first, nineteen hundred and nine, including the expenses and compensation of the board of docks, rentals payable by it, the compensation of its appointees, the expenses necessarily incurred in keeping, maintaining and repairing the wharves belonging to the city, in cleaning slips, and in maintenance or operation of any ferry or terminal facilities thereof, shall be considered operating expenses of the city, and The City of New York shall not expend any part of proceeds of sales of corporate stock, for the purposes of paying such operating expenses made or incurred after December thirty-first,

until a copy of said contract has been filed with the comptroller of said city by the president of a borough, the head of the department or board having such work in charge, and also a certificate in writing from the president of a borough, head of such department or board, stating that a payment is due and the amount of such payment. On work contracted for subsequent to May seventh, eighteen hundred and seventy-two, or hereafter contracted for, no interest shall be charged on the monthly or other intermediate payments to any contractor, and fifteen per centum, and no more, shall be reserved from the amount or value of work specified and certified from time to time to the comptroller of said city, by the proper officer, to have been done by any contractor; and such reserved fifteen per centum shall be paid to such contractor on or before the expiration of thirty days from the completion and acceptance of the work. The fund heretofore created by the corporation known as the mayor, aldermen and commonalty of the city of New York, known as the "street improvement fund," shall be continued, and into such fund shall be paid the proceeds of the sale of assessment bonds as by this section authorized, and of such bonds as may by other provisions of law be authorized to be issued for similar purposes within the territory of the city of New York, as hereby constituted, and for the payment of the expense of which the said city may, in the first instance, become liable, as well as the cash balances of assessments already collected, or to be hereafter collected, on account of similar contracts duly entered into by the proper authorities of the several municipal or public corporations, or parts thereof, which by this act are consolidated with the corporation known as the mayor, aldermen and commonalty of the city of New York. (*As amended by L. 1912, ch. 492.*)

stating that a payment is due and the amount of such payment. On work contracted for subsequent to May seventh, eighteen hundred and seventy-two, or hereafter contracted for, no interest shall be charged on the monthly or other intermediate payments to any contractor, and thirty per centum, and no more, shall be reserved from the amount or value of work specified and certified from time to time to the comptroller of said city, by the proper officer, to have been done by any contractor; and such reserved thirty per centum shall be paid to such contractor on or before the expiration of thirty days from the completion and acceptance of the work. The fund heretofore created by the corporation known as the mayor, aldermen and commonalty of The City of New York, known as the "street improvement fund," shall be continued, and into such fund shall be paid the proceeds of the sale of assessment bonds as by this section authorized, and of such bonds as may by other provisions of law be authorized to be issued for similar purposes within the territory of The City of New York, as hereby constituted, and for the payment of the expense of which the said city may, in the first instance, be

bidders therefor; provided, that no proposals for bonds or stocks shall be accepted for less than the par value of the same; and said proposals shall only be publicly opened by the comptroller, in the presence of the commissioners of the sinking fund, or such of them as shall attend. It shall be a condition of sale of such bonds and

Sixtieth street, except operating expenses made or incurred after December thirty-first, nineteen hundred and nine, shall be paid out of said moneys in the manner above provided. The limitation upon the annual expenditure in this section shall not apply to expenditure made on account of the equipment, maintenance or operation of any such ferry, or on account of the acquisition of property therefor, but the maximum sum mentioned may be expended annually for the other purposes and in the manner specified in said section. Operating expenses of the department of docks after December thirty-first, nineteen hundred and nine, including the expenses and compensation of the board of docks, rentals payable by it, the compensation of its appointees, the expenses necessarily incurred in keeping, maintaining and repairing the wharves belonging to the city, in cleaning slips, and in maintenance or operation of any ferry or terminal facilities thereof, shall be considered operating expenses of the city, and The City of New York shall not expend any part of proceeds of sales of corporate stock, for the purposes of paying such operating expenses made or incurred after December thirty-first,

Assessment bonds; provisions governing issue of same.

§ 181. It shall be lawful for the comptroller, when authorized by the board of estimate and apportionment to issue assessment bonds, at not less than par, for such periods as said comptroller may determine, not exceeding ten years, and bearing interest at such a rate as the board of commissioners of the sinking fund may prescribe, to provide the means necessary to pay all the expenses incurred or to be incurred on account of regulating and paving streets, building sewers, and all other work ordered to be done by contract, by virtue of ordinances which may be hereafter passed by the board of aldermen of the city of New York, the expense whereof is to be collected by assessment from the property benefited by said work or works, or on account of any local improvement or other public work heretofore made or performed, or that shall hereafter be made or performed under and by virtue of the authority of any law in all cases in which the said expense is to be paid in whole or in part by assessment upon the property benefited. No moneys shall be paid out of the proceeds of said bonds on account of any contract hereinbefore referred to,

to be issued for similar purposes within the territory of the city of New York, as hereby constituted, and for the payment of the expense of which the said city may, in the first instance, become liable, as well as the cash balances of assessments already collected, or to be hereafter collected, on account of similar contracts duly entered into by the proper authorities of the several municipal or public corporations, or parts thereof, which by this act are consolidated with the corporation known as the mayor, aldermen and commonalty of the city of New York. (*As amended by L. 1912, ch. 492.*)

stating that a payment is due and the amount of such payment. On work contracted for subsequent to May seventh, eighteen hundred and seventy-two, or hereafter contracted for, no interest shall be charged on the monthly or other intermediate payments to any contractor, and thirty per centum, and no more, shall be reserved from the amount or value of work specified and certified from time to time to the comptroller of said city, by the proper officer, to have been done by any contractor; and such reserved thirty per centum shall be paid to such contractor on or before the expiration of thirty days from the completion and acceptance of the work. The fund heretofore created by the corporation known as the mayor, aldermen and commonalty of The City of New York, known as the "street improvement fund," shall be continued, and into such fund shall be paid the proceeds of the sale of assessment bonds as by this section authorized, and of such bonds as may by other provisions of law be authorized to be issued for similar purposes within the territory of The City of New York, as hereby constituted, and for the payment of the expense of which the said city may, in the first instance, become liable, as well as the cash balances of assessments already collected, or to be hereafter collected, on account of similar contracts duly entered into by the proper authorities of the several municipal or public corporations, or parts thereof, which by this act are consolidated with the corporation known as the mayor, aldermen and commonalty of the city of New York. (*As amended by L. 1907, ch. 439, § 5.*)

Proposals for city bonds or stocks; conditions and deposit.
(See 3d Ed., p. 135.)

§ 182. Whenever any bonds or stocks shall be hereafter issued, other than certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven and one hundred and eighty-nine of this act, or other than corporate stock issued in the currency of a foreign country pursuant to the provisions of section one hundred and sixty-nine of this act, or such bonds and stocks as may be purchased for investment by the commissioners of the sinking fund, the comptroller shall invite proposals therefor by public advertisement, for not less than ten days, and shall award the same to the highest bidder or bidders therefor; provided, that no proposals for bonds or stocks shall be accepted for less than the par value of the same; and said proposals shall only be publicly opened by the comptroller, in the presence of the commissioners of the sinking fund, or such of them as shall attend. It shall be a condition of sale of such bonds and

stocks, and the advertisement calling for proposals therefor shall so declare, that every bidder may be required to accept a portion of the whole amount therefor bid by him at the same rate or proportional price as may be specified in his bid; and any bid which conflicts with this condition shall be rejected; provided, however, that any bidder offering to purchase all or any part of the bonds offered for sale at a price at par or higher may also offer to purchase all or none of said bonds at a different price, and if the comptroller deems it to be in the interest of the city so to do, he may award the bonds to the bidder offering the highest price for all or none of said bonds; provided, however, that if the comptroller deems it to be in the interest of the city so to do, he may reject all bids. Every bidder, as a condition precedent to the reception or consideration of his proposal, shall deposit with the comptroller a certified check, drawn to the order of said comptroller upon a trust company or a state bank incorporated and doing business under the laws of the state of New York, or a national bank, or a sum of money; such check or money to accompany the proposal to an amount to be fixed by the comptroller not exceeding two and one-half per centum of the amount of the proposal. Within three days after the decision as to who is or are the highest bidder or bidders, the comptroller shall return all deposits made to the persons making the same, except the deposit made by the highest bidder or bidders, and if the said highest bidder or bidders shall refuse or neglect, within five days after service of written notice of the award to him or them, to pay to the city chamberlain the amount of the stocks or bonds awarded to him or them at their par value, together with the premium thereon, less the amount deposited by him or them, the amount or amounts of deposits thus made shall be forfeited to and retained by said city as liquidated damages for such neglect or refusal, and shall thereafter be paid into the sinking fund of The City of New York, for the redemption of the city debt. If at any time a portion of the bonds and stock which are offered at public sale in conformity with the provisions of this section shall fail to be sold, the comptroller is hereby authorized to sell at private sale, for not less than the par value thereof, the said portion of said bonds and stock which failed to be sold. (*As amended by L. 1911, ch. 456.*)

Bonds for state taxes. (See 3d Ed., p. 137.)

§ 186. For the purpose of enabling The City of New York to make payment of the quota of state taxes which may be imposed upon, and chargeable to the said city and the counties wholly comprised therein, at the same time or times that other counties of this state

are or may be required to make payment by law, the comptroller is hereby authorized and required, unless the money for the payment of the same shall have been otherwise provided, to issue certificates of indebtedness and other evidences of indebtedness issued pursuant to the provisions of section one hundred and eighty-seven of this act for such amounts as may from time to time become necessary to meet such quota of the state taxes and from the proceeds thereof to pay to the state treasurer the amount of taxes which the comptroller of the state shall have apportioned according to law, and which may be required to be paid in pursuance of such apportionment to the state by The City of New York and said counties at such times. (*As amended by L. 1910, ch. 683.*)

Certificate of indebtedness or other evidence of indebtedness of city; special funds. (See 3d Ed., p. 138.)

§ 187. The comptroller is authorized to borrow, from time to time, on the credit of the corporation, in anticipation of its revenues, and not to exceed in amount the amount of such revenues, such sums as may be necessary to meet expenditures under the appropriations for each current year, including such amounts as are to be raised by The City of New York, for county purposes. Such amounts shall be obtained by the issue of certificates of indebtedness or other evidences of indebtedness, which shall be termed "revenue bonds," "revenue bills" or be known by such other name as may be approved by the comptroller and which shall be in such form as may be designated by the comptroller, and which shall be redeemed out of the proceeds of the tax levy in anticipation of the collection of which such certificates of indebtedness or other evidences of indebtedness were issued. Whenever the comptroller may be authorized by the provisions of this act, or by laws heretofore or hereafter enacted, to issue revenue bonds, certificates of indebtedness or other evidences of indebtedness for purposes other than to meet expenditures under the appropriations for each current year, such certificates of indebtedness or other evidences of indebtedness shall be redeemed out of the tax levy for the year next succeeding the year of their issue, and the necessary appropriation therefor shall be made by the board of aldermen and the board of estimate and apportionment in the budget for such year. Such last mentioned certificates of indebtedness or other evidences of indebtedness may be designated and known as "Special revenue bonds," "Special revenue bills" or by such other name or title as may be approved by the comptroller and shall be in such form as may be designated by the comptroller. Cash balances of special funds in the treasuries or to the credit of

the several municipal or public corporations or parts thereof, including the counties of Kings, Queens and Richmond, hereby consolidated with the mayor, aldermen and commonalty of The City of New York shall be transferred by the comptroller to like special funds of The City of New York, where such exist; and such special funds shall thereupon be liable for payments which would otherwise have been made out of the funds so transferred. Where no similar funds exist in the treasury or to the credit of The City of New York, such special fund shall be, so far as practicable, administered in the same manner as they would have been administered if this act had not been passed. Whenever it shall appear that the charges and liabilities of any such special fund exceed the available assets thereof, it shall be lawful for the board of estimate and apportionment, upon the written request of the comptroller, to authorize the issue of certificates of indebtedness or other evidences of indebtedness or assessment bonds or corporate stock of The City of New York, for the purpose of supplying such deficiency. (*As amended by L. 1910, ch. 683.*)

Issue of revenue bonds discretionary.

The time when revenue bonds shall be issued is a matter left to the discretion of the comptroller, to be governed in its exercise by the city's needs and the amount of the particular year's uncollected taxes. *Levy v. McClellan*, 196 N. Y. 178, aff'g 132 App. Div. 913, 116 N. Y. Supp. 1087.

Revenue bonds not counted in computing city's indebtedness.

In ascertaining the limit of the city's capacity to become further indebted, there should not be included in the computation, revenue bonds, issued under this section to meet expenditures under the appropriations for each current year and to be redeemed out of the proceeds of the tax levy, when such bonds have not been outstanding for more than five years since their issue, nor should such computation include revenue bonds issued under this section for purposes other than to meet expenditures under the appropriations for each current year and which are redeemable out of the tax levy for the year next succeeding the year of their issue. *Levy v. McClellan*, 196 N. Y. 178, aff'g 132 App. Div. 913, 116 N. Y. Supp. 1087.

Certificates of indebtedness or other evidences of indebtedness to be redeemed out of the tax levy for the year next succeeding the year of their issue. (See 3d Ed., p. 139.)

§ 188. The comptroller is authorized to issue certificates of indebtedness or other evidences of indebtedness to be redeemed out of the tax levy for the year next succeeding the year of their issue to provide the means necessary to make payments for the following purposes:

1. The expense necessarily incurred in condemning unsafe build-

ings as provided by section five hundred and eleven of chapter four hundred and ten of the laws of eighteen hundred and eighty-two.

2. Amounts audited by the board of estimate and apportionment pursuant to section two hundred and thirty-one of this act.

3. Such amounts as may be necessary to pay judgments recovered against the corporation; provided, however, that when such judgments shall have been recovered for county charges or liabilities of any of the counties included within the territorial limits of The City of New York, separate accounts shall be kept thereof. The corporation counsel shall, in all such cases, advise the comptroller as to the amount of such county liability and the county incurring the same, and it shall, thereupon, be the duty of the comptroller in making the certificate to the board of aldermen, required by section nine hundred and two of this act in respect to county charges, to include in the amounts chargeable against each of such counties the amounts of such judgments respectively paid on account thereof during the preceding calendar year. It shall also be the duty of the comptroller in estimating the revenues of the general fund for the reduction of taxation as required by section nine hundred of this act, to include the amounts which shall be respectively chargeable against each of such counties.

4. The amount appropriated in pursuance of section two hundred and thirty-six of this act in those cases in which the appropriations are made after the final passage of the annual appropriations and the certification to the board of aldermen of the amount to be raised.

5. The amount necessary to defray the expense of supplying water meters as authorized by section four hundred and seventy-five of this act.

6. To provide for deficiencies in the fund for street and park openings as provided in section one hundred and seventy-four of this act.

7. To provide for the payment of claims, charges, expenses and appropriations which have been or may be lawfully payable by The City of New York, as hereby constituted, and the several counties wholly included within its limits, and for which no other provision for payment has been made. Separate accounts shall be kept of the bonds issued and payments made on account of county charges and expenses, and the comptroller shall similarly certify the amounts thereof to be raised by tax in the respective counties and to be included in the general fund for the reduction of taxation as provided by subdivision three of this section in the case of judgments.

8. To provide for the payment of expenses authorized by the concurrent vote of all the members of the board of estimate and ap-

portionment upon a resolution requesting such authorization, adopted by the affirmative vote of three-fourths of all the members of the board of aldermen; provided, however, that the amount thus issued shall not in any one year exceed two million dollars.

9. To meet and pay the expenses incurred pursuant to the provisions of sections eleven hundred and seventy-seven and eleven hundred and seventy-eight of this act. (*As amended by L. 1910, ch. 683.*)

See *Matter of Simpson v. Prendergast*, digested under § 149, *ante*.

Notes to be issued in anticipation of the sale of corporate stock. (New.)

§ 189. The comptroller is authorized to issue, whenever he may deem it for the best interests of the city so to do, bills or notes, hereinafter described as "notes," maturing within a period not to exceed one year, in anticipation of the sale of corporate stock duly authorized at the time such notes are issued. The proceeds of the sale of such notes shall be used only for the purposes for which may be used the proceeds of the sale of corporate stock in anticipation of the sale whereof the notes were issued. All of such notes and any renewals thereof shall be payable at a fixed time, and no renewal of any such note shall be issued after the sale of corporate stock in anticipation of which the original note was issued. In the event that a sale of such corporate stock shall not have occurred prior to the maturity of the notes so issued in anticipation of such sale the comptroller shall, in order to meet the notes then maturing, issue renewal notes for such purpose. Every such note and renewal note shall be payable from the proceeds of the next succeeding sale of corporate stock. The total amount of such notes or renewals thereof issued and outstanding shall at no time exceed one-half of the total amount of corporate stock authorized to be issued and if no sale of corporate stock shall have been held within six months preceding the issue of such notes then the total amount of such notes or renewals thereof, issued and outstanding, shall at no time exceed one-half the total amount of corporate stock authorized to be issued on the date which shall be six months after such last preceding sale. (*Added by L. 1911, ch. 224.*)

§ 195. Duties of chamberlain. (See 3d Ed., p. 141.)

An order regularly made directing payment of moneys deposited by a special guardian with the City Chamberlain of The City of New York to the person named therein and payment by the Chamberlain in accordance with

such order, is a protection to the Chamberlain and his successors against a claim subsequently made by another person, bearing the same name and claiming to be the true owner of the fund; and such order should not be vacated, nor can the successor of the Chamberlain be required to pay over the fund. *Matter of McNulty*, 68 Misc. 93, 123 N. Y. Supp. 1070.

Public moneys; where to be deposited; salary of chamberlain.

(See 3d Ed., p. 143.)

§ 196. The said chamberlain and mayor and comptroller shall, by a majority vote, by written notice to the comptroller designate the banks or trust companies, in which all moneys of The City of New York shall be deposited, and may, by like notice in writing, from time to time, change the banks and trust companies thus designated; but no such bank or trust company shall be designated unless its various officers shall agree to pay into the city treasury interest on the daily balances at a rate to be fixed by the mayor and chamberlain and the said comptroller of The City of New York, by a majority vote, which rate shall be so fixed quarterly, on the first days of February, May, August and November in each year, according to the current rate of interest upon like balances deposited in banks and trust companies in The City of New York by private persons or corporations. Banks or trust companies designated for the deposit of city moneys under the provisions of this section shall, before deposits are made, other than such as are of a temporary character and specifically relate to the current business of the city, severally execute and file with the chamberlain, a bond to The City of New York in such form and in such amount as may be prescribed and approved by the chamberlain and comptroller for the safe-keeping and prompt payment of such moneys on legal demand therefor with interest at the rate agreed upon and, as surety for such bond, shall deposit with the comptroller, outstanding unmatured bonds, corporate stock, revenue bonds, assessment bonds or other obligations issued by The City of New York, the value of which at existing prices on the open market shall be equal to the estimated amount of the proposed deposit, for which the chamberlain and comptroller shall deliver a certificate of deposit containing the conditions of said surety bond. On the withdrawal of all or a part of the funds deposited in any depository and a closing or depleting of the account thereof, or in the event of the deposit actually made being less than the estimated amount of such deposit, the chamberlain and comptroller shall certify to such settlement or depletion or difference and direct the surrender of the whole or a proportionate share of such deposit to the owner or owners thereof. The said chamberlain shall keep books showing

the receipts of moneys from all sources, and designating the sources of same, and also showing the amounts paid from time to time on account of the several appropriations, and no warrants shall be paid on account of any appropriation after the amount authorized to be raised for that specific purpose shall have been expended. The said chamberlain shall once in each week report in writing to the mayor and to the comptroller all moneys received by him, the amount of all warrants paid by him since his last report, and the amount remaining to the credit of the city. The chamberlain shall receive the sum of twelve thousand dollars annually, and no more, for his services as chamberlain of said city and as county treasurer of the county of New York in lieu of all salary and of all interest, fees, commissions and emoluments; and all such interest, fees, commissions and emoluments shall be accounted for and paid over by him to the city treasury, except that the commissions or compensation provided by law, and received by him for receiving and paying over state taxes, and all interest which accrues on deposits shall be paid by him to the commissioners of the sinking fund. He may appoint and remove at pleasure deputy chamberlains, and such clerks and assistants as may be necessary whose salaries, together with all the expenses of the office, shall be paid by The City of New York when fixed by the board of aldermen on the recommendation of the board of estimate and apportionment. The chamberlain shall also have power to designate in writing one of said clerks to act as warrant clerk, whose duty it shall be to sign warrants and to perform such other duties as may be required of him, under the direction of the chamberlain. (*As amended by L. 1911, ch. 304.*)

§ 197. Respecting disposition of moneys paid into court.
(See 3d Ed., p. 144.)

The provision of L. 1892, ch. 651, providing that whenever a sum of money paid into court shall have remained in the hands of the City Chamberlain for a period of twenty years, it shall be paid over by such officer with all accumulations of interest thereon, after deducting his legal fees to the Treasurer of the State of New York, is not unconstitutional. The act does not in terms or by inference change in the slightest particular the ownership of the funds in the custody of the Chamberlain. By express terms, it provides for payment of the moneys to the owner or owners thereof upon the warrant of the Comptroller as ordered by the court. The title to them is vested in known or unknown beneficiaries, and a change of their custody from one officer to another does not in any way change the rights of the beneficial owners of the fund. Accordingly, the Chamberlain of The City of New York will be compelled by mandamus to pay over to the Treasurer of the State, all moneys paid into court and remaining unclaimed for over twenty years,

as required by the statute. *People v. Keenan*, 110 App. Div. 537, 97 N. Y. Supp. 77, aff'd without opinion, 185 N. Y. 600.

Powers of commissioners of sinking fund. (See 3d Ed., p. 146.)

§ 205. The said board shall, except as in this act otherwise specifically provided, have power to sell or lease for the highest marketable price or rental at public auction or by sealed bids, and always after public advertisement for a period of at least fifteen days in the City Record, and after appraisal under the direction of said board made within three months of the date of sale, any city property except parks, wharves and piers and land under water, except as hereinafter provided, but no such lease shall run for a term longer than ten years nor a renewal for a longer period than ten years. If such property be market property it shall be sold only pursuant to a resolution adopted by an unanimous vote of the commissioners of the sinking fund, concurred in by the board of aldermen. The commissioners of the sinking fund shall have power to assign to use for any public purposes any city property, for whatsoever purpose originally acquired, which may be found by the department having control thereof to be no longer required for such purpose. The proceeds of said sale or leasing shall on receipt thereof, after paying necessary charges, be immediately paid to the credit of the sinking fund for the redemption of the city debt. Said commissioners of the sinking fund shall have power, by unanimous vote, to settle and adjust by mutual conveyances or otherwise, and upon such terms and conditions as may seem to them proper, disputes existing between the city and private owners of property, in respect to boundary lines, and to release such interests of the city in real estate as the corporation counsel shall certify in writing to be mere clouds upon titles of private owners, in such manner and upon such terms and conditions as in their judgment shall seem proper.

The commissioners of the sinking fund are hereby authorized to approve agreements, submitted by the commissioner of docks, fixing, determining upon and establishing the line of high water as provided for in section eight hundred and eighteen-a and are further authorized to sell and convey to the upland owner lands under water inside of such line, to purchase from the upland owner any lands outside of such line and to exchange lands under water inside of such line for lands outside of such line upon such terms and conditions as in their judgment shall seem proper.

Said commissioners of the sinking fund shall also have power

to sell and convey the right, title and interest of the city in and to lands lying within any street, avenue, road, highway, alley, lane or public place or square that has been discontinued and closed, in whole or in part, by lawful authority, to the owner of lands fronting on such street, avenue, road, highway, alley, lane or public place or square so discontinued and closed, on such terms and conditions and for such consideration as in the judgment of the said commissioners of the sinking fund shall seem proper, provided the said commissioners of the sinking fund shall first determine that the said lands or the part thereof so sold and conveyed, are not needed for any public use. Said commissioners of the sinking fund shall have discretion to direct the demolition or removal of all buildings or other structures, the title to which has been acquired by the city in condemnation proceedings or by purchase, and not needed for any public purposes, in the same manner as now provided by law for the demolition and removal of unsafe buildings, and in such cases the expense of such demolition and removal shall be paid in the same manner as is now provided for the demolition and removal of unsafe buildings. They may also, prior to the confirmation of the report of commissioners of estimate * of appraisal, or prior to the purchase of the premises upon which said buildings or parts of buildings or other structures are erected, or prior to the vesting of title therein, agree with the owner or owners thereof, or any person having a beneficial interest therein, in case title has not vested in the city, and in the case title has vested in the city, with the person or persons entitled to the award or awards therefor, as to the cost and compensation to be allowed and paid to said owner or owners, or other persons for the removal of said buildings or parts of buildings or other structures, as the compensation to be awarded by said commissioners or allowed for the damage done said building or buildings or other structures in the acquisition of title thereto, and it may also, as a condition of the sale by the city at private sale of its interest therein after vesting of title in said buildings or parts of buildings or other structures to the owner or owners of the award or awards therefor, or other persons having an interest therein, agree that damages to be awarded by the commissioners shall be the agreed compensation for the purpose of the removal thereof, provided, however, that such buildings or parts of buildings or other structures shall not, in any case, be relocated or re-erected within the lines of any proposed street or other public improvement.

Commissioners of estimate and appraisal shall accept such agreed amounts of compensation for the removal of buildings or parts of

* So in original.

buildings or other structures as the amounts to be awarded as such compensation and include the same in their reports. Said commissioners of the sinking fund shall prescribe such conditions in the terms of sale which, if broken, shall entitle the city to a resale of said property, and which shall revert title to same in the city.

Said commissioners of the sinking fund shall also have power to lease all or any part of the right, title and interest heretofore or hereafter acquired by the city in and to any lands outside the limits of said city for the sanitary protection of the water supply, and to grant in perpetuity, or for shorter periods, rights, easements, or rights of way in, over or across any such lands, for highway purposes, or for the improvement of the facilities and public service of railroads heretofore located thereon upon such terms and conditions, for such consideration, and subject to such restrictions as in the judgment of said commissioners shall seem proper; provided that no such lease or grant shall be made unless the said commissioners shall first determine that the said lands or interests therein, so granted or conveyed, are to be used or enjoyed for a purpose which is consistent with the sanitary protection of the water supply of said city, and provided that every such grant or lease shall contain covenants restricting the use of such lands, or interests therein, in accordance with the determination of said commissioners and providing for the forfeiture to the city of the lands or interests therein upon breach of any of said covenants. The provisions of existing laws or ordinances relative to the investment of moneys and assets of the several sinking funds hereby made subject to the control of the commissioners of the sinking fund as hereby constituted, in bonds, stocks, or obligations of the municipal or public corporations or parts thereof hereby consolidated into The City of New York, including the counties of Kings and Richmond, shall hereafter apply to investments thereof in the bonds and stock of the corporation of The City of New York, issued on and after January first, eighteen hundred and ninety-eight, provided, however, that such bonds or stock shall not thereupon or thereafter be cancelled except as herein otherwise specifically provided, but the same shall upon their maturity be paid off, liquidated or discharged in the same manner as they would be if held by private creditors. It shall be lawful for the commissioners of the sinking fund in their discretion, and they are hereby empowered in such discretion to cancel from time to time, but not before maturity, bonds and stock of any of the municipal and public corporations or parts thereof forming part of the corporation of The City of New York, as hereby constituted, and of the counties of Kings and Richmond, which may be held by any of said sinking funds on December

thirty-first, eighteen hundred and ninety-seven, providing said bonds and stocks are by law redeemable from the sinking funds in which the same are held. It shall also be lawful for the commissioners of the sinking fund in their discretion and they are hereby empowered in such discretion, to cancel from time to time but not before maturity, any portion of the indebtedness of The City of New York, as hereby constituted, incurred on or after January first, eighteen hundred and ninety-eight, which may be held by them in the sinking fund of The City of New York, as hereinafter constituted, and which may by law be redeemable from said sinking fund as herein or elsewhere provided, and all such similar indebtedness incurred to provide for the supply of water, which may be held by them and redeemable from the water sinking fund of The City of New York as hereinafter constituted. The funds to be known as the sinking fund of The City of New York as hereinafter constituted, shall be administered by the commissioners of the sinking fund, in like manner as provided by the ordinance of the mayor, aldermen and commonalty of The City of New York, approved by the mayor, February twenty-second, eighteen hundred and forty-four, so far as the same may be applicable; provided, however, that nothing contained in said ordinance shall affect or alter the composition of the board of commissioners of the sinking fund, as by this act constituted. The rate of interest on all corporate stock, bonds or other obligations for the payment of money of whatsoever kind or description issued by The City of New York except certificates of indebtedness or other evidences of indebtedness, issued pursuant to the provisions of section one hundred and eighty-seven of this act, shall be prescribed by the commissioners of the sinking fund. The commissioners of the sinking fund may by resolution assign the places where the several municipal courts shall be held within their respective districts and may assign such place in said city as may to it seem most conducive to the public convenience for the holding of the courts of general and special sessions, and, upon the application of the board of city magistrates, may designate additional places for the holding of magistrates' or police courts and jail delivery to be held in and for the city; notice of any change of the places of holding such courts shall, before the same takes effect, be published in the City Record and the corporation newspapers for a period of not less than two weeks. Said publication shall be made under the direction of the comptroller. The commissioners of the sinking fund may by resolution designate from time to time any building or buildings within the city to be the common jails of said city or of any of the counties contained within its territorial limits, for all the purposes for which common jails may by law be

used, and such building or buildings so designated shall be such common jails until changed by a like resolution of the commissioners of the sinking fund. The sinking fund commissioners of The City of New York shall not have the power in any event to compromise or release any existing liability or obligation to The City of New York or to the mayor, aldermen or commonalty of The City of New York, or to any of the municipalities or parts of municipalities consolidated with the former City of New York, under the provisions of chapter six hundred and forty-two of the laws of eighteen hundred and eighty-six or under chapter four hundred and thirty-four of the laws of eighteen hundred and ninety-three, but such liabilities and obligations shall be and remain inviolable. (*As amended by L. 1911, ch. 694.*)

Leases.

The omission of the commissioners of the sinking fund to have an appraisal made before putting up a lease at public auction, does not impair or affect the purchaser's right to the lease and does not justify the city in repudiating the lease upon that ground. *Brown v. City of New York*, 57 Misc. 433, 108 N. Y. Supp. 555, aff'd 128 App. Div. 925, 112 N. Y. Supp. 1123.

A resolution of the commissioners of the sinking fund authorizing the sale of a lease at public auction, and reserving to the comptroller the right to reject the bid if he deems it for the best interest of the city to do so, *held not* to confer any power upon the comptroller to reject a bid after the lease has been knocked down to the highest bidder, and he has made the payment prescribed by the terms of sale and received a receipt therefor. *Brown v. City of New York*, 57 Misc. 433, 108 N. Y. Supp. 555, aff'd 128 App. Div. 925, 112 N. Y. Supp. 1123.

Sale of lands within closed street.

The amendment to this section made by L. 1903, ch. 379, providing for the sale of the lands lying within a closed street to the abutting owner, is not inconsistent with and did not operate as a repeal of the provisions of L. 1895, ch. 1006, § 17. In order, therefore, to entitle an abutting owner to a conveyance from The City of New York of lands embraced in a closed street, there must be a determination by the local authorities that the lands are not required for other public use, and a payment to the city of the amount found by the commissioners of estimate and assessment as the value of the lands over and above taxes and assessments, and also the payment of taxes and assessments levied upon the property. In the absence of these requirements, the title of the city becomes absolute and the property must be disposed of according to the general law in relation to the disposal of real property owned by the city. *People ex rel. Brown v. Metz*, 119 App. Div. 271, 104 N. Y. Supp. 649, aff'd without opinion, 189 N. Y. 550.

Debts created by armory board.

The armory board has no power to create an indebtedness binding upon

the city until authorized to incur such indebtedness by the commissioners of the sinking fund. *Horgan & Slattery v. City of New York*, 114 App. Div. 555, 100 N. Y. Supp. 68.

**Powers of commissioners of sinking fund to exchange lands
no longer used for public purpose for other lands. (New.)**

§ 205a. The commissioners of the sinking fund are authorized by unanimous vote except as otherwise specifically provided in the Greater New York charter, subject, however, to the approval of the board of estimate and apportionment to be given, as hereinafter provided, upon the application of any department, board, body or officer of The City of New York, for or to whose use any lands of The City of New York have been acquired or assigned as provided in section two hundred and five of the Greater New York charter and upon the determination of said commissioners that such real property of The City of New York as shall be specified in such application is no longer needed for departmental or public purposes, to exchange any such land with or without the improvements thereon for other land of equal or greater value of private owners lying within the same borough of The City of New York, provided that the said commissioners shall determine that such lands of private owners are needed for a public purpose. To determine the value of the land of The City of New York, and the land to be exchanged therefor, the said commissioners shall have such property of The City of New York and the property of the owners duly appraised by three discreet and disinterested appraisers to be appointed by the said commissioners, said appraisers being residents of the borough in which such lands are situated, and such appraisal shall be made within three months prior to the date of such exchange. Certified copies of the resolutions adopted by the commissioners of the sinking fund, together with the reports and appraisals of the appraisers as herein provided shall be presented to the board of estimate and apportionment at its first meeting thereafter, and if the board of estimate and apportionment, by a three-fourths vote, approves of the resolutions and action of the commissioners of the sinking fund authorizing such exchange, then and in that event such exchange shall be made, and the corporation counsel of The City of New York shall upon the direction of the said commissioners of the sinking fund by a resolution duly adopted and certified approve the form of all legal instruments necessary on the part of The City of New York to effect such exchange in law, and the said commissioners shall designate and authorize the proper officer to execute and deliver any and all legal instruments necessary to effectuate such exchange, as aforesaid. The land so acquired by

Power of commissioners of sinking fund to lease, or sell and convey certain land under water.

§ 205-b. Notwithstanding any provision of the Greater New York Charter or of any other act, the commissioners of the sinking fund are hereby authorized in their discretion to lease or to sell and convey to the upland owner any of the land under water along the westerly shore of the East River inside the bulkhead line between the northerly and southerly limits prescribed by chapter two hundred and eight-six of the laws of eighteen hundred and eighty-nine. (*Added by L. 1912, ch. 400.*)

~~any money, and no money~~ no provision for the payment thereof otherwise than from taxation is made, and excepting revenue bonds, certificates of indebtedness or other evidences of indebtedness, issued pursuant to the provisions of section one hundred and eighty-seven of this act, and bonds issued to provide for the supply of water. For the redemption of such debt out of said sinking fund there shall be annually included in the budget and paid into the sinking fund of The City of New York herein created, an amount to be estimated and certified by the comptroller, and to be by the board of estimate and apportionment inserted in the budget for each year, which with the accumulations of interest thereon shall be sufficient to meet and discharge such bonds or stocks by the time the same shall be payable; provided, however, that there shall be deducted from said amount, the amounts annually received from the operation of any rapid transit railroad or railroads for the construction of which bonds shall have been issued pursuant to the provisions of the rapid transit act applicable to The City of New York or any municipal corporation or territory embraced therein. Whenever the bonds and stocks outstanding on December thirty-first, eighteen hundred and ninety-seven, and being charges or liens on any of the sinking funds hereby made subject to the control of the commissioners of the sinking fund, shall in respect to any such sinking fund be wholly discharged, liquidated or canceled, it shall thereupon be lawful for the commissioners of the sinking fund to cancel such bonds of the corporation of The City of New York issued on or after January first, eighteen hundred and ninety-eight, as may be held by such sinking fund, and the revenues of such sinking fund when thus relieved of such liens or charges shall thereupon and thereafter be paid into the sinking fund of The City of New York, as herein created. Whenever such payments shall be made, the comptroller in making the certificate to the board of estimate and apportionment by this sanction* required shall take into account the amount thereof, and

* So in original.

deduct the same from the estimated amount to be included in the year's budget as herein provided. (As amended by L. 1910, ch. 683.)

Commissioners may call in bonded debt; consolidated of The City of New York; lien of, on sinking fund for redemption of the city debt. (See 3d Ed., p. 154.)

§ 213. The commissioners of the sinking fund are hereby authorized and empowered to call in, pay, and redeem any portion of the bonded debt constituting a charge upon the treasury of The City of New York, as constituted by this act, other than revenue bonds issued in anticipation of the collection of taxes, certificates of indebtedness or other evidences of indebtedness, issued pursuant to the provisions of section one hundred and eighty-seven of this act when they may deem it to be advantageous for the interest of the city so to do, and for this purpose the said commissioners of the sinking fund, are hereby empowered by a concurrent vote, and subject to the approval of the board of estimate and apportionment, to authorize and direct the comptroller to issue and sell or exchange therefor at not less than par, corporate stock of said city, in the manner herein provided; and upon the payment and redemption of any portion of said bonded debt the certificates thereof shall be canceled by said commissioners of the sinking fund. The "consolidated stock" of the mayor, aldermen and commonalty of The City of New York, issued pursuant to the provisions of section one hundred and seventy-six of chapter four hundred and ten, of the laws of eighteen hundred and eighty-two, after fully providing for the preferred bonds and stocks of said city, as in the preceding section specified, shall form a charge, upon the said "sinking fund for the redemption of the city debt," and any part of the bonded debt of said corporation falling due and not exchanged for or redeemed from the proceeds of said consolidated stock as in said section provided, may be paid from said sinking fund for the redemption of the said city debt, provided such payment shall not in any way impair the preferred claims thereon as in the preceding section specified, and provided also, the commissioners of the sinking fund shall deem it to be for the best interests of the city that such payment shall be so made. (As amended by L. 1910, ch. 683.)

Commissioners of sinking fund; power to cancel taxes, assessments and water rents. (New.)

§ 214. The commissioners of the sinking fund of The City of New York upon the written certificate of the comptroller of said city, and upon the same, with whom such application for relief under

the amount to be paid by this section shall be filed, may in their discretion and upon such terms as they may deem proper, by a unanimous vote cancel and annul all taxes, assessments and Croton water rents and sales to said city of any or all of the same which now are or may hereafter become a part of, on sinking fund.

General fund bonds; how issued; sinking fund.

§ 222. In addition to the bonds and stocks now authorized by law the city of New York is hereby authorized to issue bonds to be called general fund bonds which may be issued in the manner prescribed in this section and shall be subject to the provisions thereof. General fund bonds shall be obligations of the city of New York like other stocks and bonds of said city and subject to all provisions of law applicable to corporate stock of the city of New York which are not inconsistent with this section. The faith and credit of the city of New York is hereby pledged for the fulfillment of all the obligations created by general fund bonds.

The board of commissioners of the sinking fund in the year one thousand nine hundred and three and in each year thereafter until all of the bonds and stock which are redeemable from the fund known as "the sinking fund of the city of New York for the redemption of the city debt" shall have matured, shall set apart out of the revenues and income of said sinking fund, except the income and accumulation thereof derived from assets held by said sinking fund on January first, nineteen hundred and three, and except also the income and accumulation thereof derived from the amount to be thus annually set apart, a sum which with the accumulation of interest thereon, together with the said assets of said sinking fund and the earnings and accumulations thereof, shall be sufficient to redeem at maturity all the bonds and stock of the city of New York which are redeemable from said sinking fund.

At least two weeks before the meeting of the board of aldermen in each and every year for the purpose of receiving the assessment-rolls required to be delivered by the board of taxes and assessments to

to the board of aldermen pursuant to section nine hundred of this act.

The comptroller of the city of New York, upon the request of the board of commissioners of the sinking fund and upon receipt of the money thus to be invested, and without the concurrence or approval of any other board or public body, and without any action or other proceedings whatever other than those provided in this section, shall issue and deliver to said board, duly signed and sealed and in such form as shall be approved by the said board, general fund bonds to the corresponding amount. The comptroller shall forthwith pay into the city treasury the money thus received which shall be deemed to be a part of the general fund and be used for the reduction of taxation.

deduct the same from the estimated amount to be included in each year's budget as herein provided. (*As amended by L. 1910, ch. 683.*)

Commissioners may call in bonded debt; consolidated stock

this section shall be filed, may in their discretion and upon such terms as they may deem proper, by a unanimous vote cancel and annul all taxes, assessments and Croton water rents and sales to said city of any or all of the same which now are or may hereafter become a lien against any real estate owned by any corporation, entitled to exemption of such real estate owned by it from local taxation under

have the power, in addition to all other powers conferred by law upon said board, to purchase for the account of any of the sinking funds under its control, or to sell at public sale to the highest bidders therefor, such an amount of the general fund bonds held by it for the account of "the sinking fund of the city of New York for the redemption of the city debt" as may be necessary for that purpose. Such general fund bonds when thus purchased for other sinking funds or sold at a public sale shall be a charge upon "the sinking fund of the city of New York," and there shall be raised annually by taxation and paid into the said sinking fund a sum which, with the accumulation of interest thereon, shall be sufficient to redeem said bonds at maturity; but so long as the said general fund bonds are held in the said fund, known as "the sinking fund of the city of New York for the redemption of the city debt," no such annual sum shall be raised for the redemption of the principal of the said general fund bonds at maturity. (*As amended by L. 1912, ch. 6.*)

like other stocks and bonds of said city and subject to all provisions of law applicable to corporate stock of The City of New York which are not inconsistent with this section. The faith and credit of The City of New York is hereby pledged for the fulfillment of all the obligations created by general fund bonds.

The board of commissioners of the sinking fund in the year one thousand nine hundred and three and in each year thereafter until all of the bonds and stock which are redeemable from the fund known as "the sinking fund of The City of New York for the redemption of the city debt," shall have matured, shall set apart out of the revenues and income of said sinking fund, except the income and accumulation thereof derived from assets held by said sinking fund on January first, nineteen hundred and three, and except also the income and accumulation thereof derived from the amount to be thus annually set apart, a sum which with the accumulation of interest thereon, together with the said assets of said sinking fund and the earnings and accumulations thereof, shall be sufficient to redeem at maturity all the bonds and stock of The City of New York which are redeemable from said sinking fund.

At least five weeks before the annual meeting of the board of

aldermen in each and every year for the purpose of receiving the assessment-rolls required to be delivered by the board of taxes and assessments to the board of aldermen, the board of commissioners of the sinking fund may in its discretion,* certify to the board of aldermen the amount as estimated by said board of commissioners of revenues or income, from all sources, of "the sinking fund of The City of New York for the redemption of the city debt," during the then calendar year and also the amount required by this section to be set apart for such calendar year out of such revenues and income for the redemption of bonds and stock.

If in any year the said estimated amount of revenues or income of said sinking fund, excepting the income and accumulation thereof derived from the assets held by said sinking fund on January first, nineteen hundred and three, and from the amounts annually set apart for the redemption of bonds and stock as by this section required, shall exceed the amount required to be set apart in such year as in this section provided, the board of commissioners of the sinking fund may in its discretion, at the time of making said certificates to the board of aldermen, determine to invest the whole or any part of the amount of such excess in general fund bonds of The City of New York for the account of "the sinking fund of The City of New York for the redemption of the city debt," but such investments shall not be made in any year until the amount required by this section to be set apart for such year, as provided herein, shall have been so set apart.

The board of commissioners of the sinking fund shall then notify the board of aldermen and the comptroller of the amount it has determined to invest in general fund bonds during the current year, and the comptroller shall include said amount in the certificate of estimated revenues of the general fund required to be by him made to the board of aldermen pursuant to section nine hundred of this act.

The comptroller of The City of New York, upon the request of the board of commissioners of the sinking fund and upon receipt of the money thus to be invested, and without the concurrence or approval of any other board or public body, and without any action or other proceedings whatever other than those provided in this section, shall issue and deliver to said board, duly signed and sealed and in such form as shall be approved by the said board, general fund bonds to the corresponding amount. The comptroller shall forthwith pay into the city treasury the money thus received which shall be deemed to be a part of the general fund and be used for the reduction of taxation.

* So in original.

General fund bonds shall be issued only to the board of commissioners of the sinking fund for the account of the said fund known as "the sinking fund of The City of New York for the redemption of the city debt." They shall be the valid and binding obligations of The City of New York, and shall bear such rate of interest, payable from taxation or the general fund, as shall be determined by the said board, and said bonds shall be due and payable at such time as shall be determined by the said board, but not earlier than the year nineteen hundred and twenty-nine and said bonds shall in all respects, except as in this section otherwise expressly provided, be like other corporate stock and bonds of the said City of New York and the rights, powers, duties, and obligations of the board of commissioners of the sinking fund in respect of said general fund bonds shall be the same in all respects, except as in this section otherwise expressly provided, as with respect of all other corporate stock of said city in said sinking fund.

When all the bonds and stocks redeemable from "the sinking fund of The City of New York for the redemption of the city debt" shall have been paid, all general fund bonds then in the said sinking fund shall be canceled.

If in any year it shall appear to the board of commissioners of the sinking fund that the revenues and income of "the sinking fund of The City of New York for the redemption of the city debt," applicable thereto will not be sufficient to provide the sum required by this section to be set apart in such year, it shall be the duty of the board of commissioners of the sinking fund to certify to the board of estimate and apportionment before said board meets for the purpose of making up the annual budget for the next ensuing year, a sum sufficient, when added to the amount of estimated revenues and income for that year, as certified by the said board of commissioners of the sinking fund, to make up the deficiency. The sum thus certified shall be included by the board of estimate and apportionment and the board of aldermen in the annual budget for the next ensuing year and be raised by taxation and paid into the said sinking fund during such year.

If at any time it shall be necessary in order to provide for the redemption of the bonds and stock which are redeemable from "the sinking fund of The City of New York for the redemption of the city debt" the said board of commissioners of the sinking fund shall have the power, in addition to all other powers conferred by law upon said board, to purchase for the account of any of the sinking funds under its control, or to sell at public sale to the highest bidders therefor, such an amount of the general fund bonds held by it for the ac-

count of "the sinking fund of The City of New York for the redemption of the city debt" as may be necessary for that purpose. Such general fund bonds when thus purchased for other sinking funds or sold at public sale shall be a charge upon "the sinking fund of The City of New York," and there shall be raised annually by taxation and paid into the said sinking fund a sum which, with the accumulation of interest thereon, shall be sufficient to redeem said bonds at maturity; but so long as the said general fund bonds are held in the said fund, known as "the sinking fund of The City of New York for the redemption of the city debt," no such annual sum shall be raised for the redemption of the principal of the said general fund bonds at maturity. (*As amended by L. 1907, ch. 439, § 7.*)

Rapid transit bonds.

Bonds issued for the construction of a rapid transit railroad or for the purchase or construction of docks, are not to be included in computing the city's permanent indebtedness, as the current net revenue received by the city from the railroad or the docks will pay the interest that has to be paid by the city and will also provide for the payment of the principal when due. *In re Debt Limit of City of New York*, 139 App. Div. 40, 123 N. Y. Supp. 860.

General fund bonds.

The general fund bonds issued under this section are to be classified with the city's corporate stock, as the faith and credit of the city are pledged for the fulfillment of their obligation. When held by the sinking fund they are the subject of deduction, in the computation of the city's permanent debt, with other sinking fund holdings. *Levy v. McClellan*, 196 N. Y. 178, aff'g 132 App. Div. 913, 116 N. Y. Supp. 1087.

§ 226. Board of estimate and apportionment; how constituted; duties; the annual budget. (See 3d Ed., p. 162.)

Amendment of resolutions.

This section contemplates that the board of estimate and apportionment shall have the power to amend a resolution adopted by it, and such amendment may be passed at a meeting subsequent to that at which the original resolution was passed. *Simpson v. Berkowitz*, 59 Misc. 160, 110 N. Y. Supp. 485.

Annual budget, effect.

Upon the adoption of the annual budget, the several sums appropriated to each position for salary become appropriated to the several positions therein named, and the salary so appropriated for each position cannot be taken away from that position or used for any other purpose except upon the abolition of the position and by the authority of the board of estimate and apportionment. *Colihan v. Miller*, 72 Misc. 140, 131 N. Y. Supp. 99.

After the adoption of the annual budget, the only way by which provision can be made for the payment of salaries of positions legally created and for which salaries have been fixed by the board of aldermen under § 56, *ante*, but for which no appropriation has been specifically made in the budget, is by the transfer by the board of estimate and apportionment of the unexpended balance of the sum appropriated by the budget for other positions which have been abolished, to the payment of such salaries. *Colihan v. Miller*, 72 Misc. 140, 131 N. Y. Supp. 99.

The action of the board of estimate and apportionment in preparing and the board of aldermen in adopting the budget is financial, and not legislative, and recitals in the budget of offices, etc., for the purpose of identification cannot be held to be a legislative creation or recognition of such office. So *held*, holding the recital in the budget of the estimated expense of the office of bureau of highways did not operate as a ratification by the board of aldermen of the unauthorized act of the president of the borough in creating the bureau. *People ex rel. Collins v. Ahearn*, 120 App. Div. 95, 104 N. Y. Supp. 860.

To the same effect see *Lyons v. City of New York*, 82 App. Div. 366, 81 N. Y. Supp. 1079 where it was held that an appropriation of a certain sum to the payment of the salary of an office did not constitute a fixing of the salary of such office and did not entitle the incumbent to recover the sum appropriated from the city.

Certain city bonds and stocks; annual provisions to meet payment of. (See 3d Ed., p. 164.)

§ 229. For the payment of all bonds and stocks of the mayor, aldermen and commonalty of The City of New York issued after June third, eighteen hundred and seventy-eight, and for the payment of all the bonds and stocks hereafter issued by The City of New York, as hereby constituted, and for which no provision for the payment thereof, otherwise than from taxation is made, except revenue bonds issued in anticipation of the collection of taxes, certificates of indebtedness or other evidences of indebtedness, issued pursuant to the provisions of section one hundred and eighty-seven of this act, there shall annually be set apart or paid over to the commissioners of the sinking fund, as hereinafter directed, and invested by them in the manner provided by law, a sum sufficient, with the accumulation of interest thereon to meet and discharge the amount of said bonds or stocks by the time the same shall be payable, as the same shall be estimated and certified by the comptroller. The said annual sum so to be set apart or paid over and invested, except so far as it relates to bonds and stocks issued on or after January first, eighteen hundred and ninety-eight, and bonds issued to provide

for the supply of water shall until other provisions therefor may be hereafter made by law, be set apart out of the surplus income, revenues and accumulations of the sinking fund for the redemption of the city debt as now established by law after fully providing for the payment of the stocks and bonds of said city now outstanding, and which, by sections two hundred and twelve and two hundred and thirteen of this act, are declared to be and are made preferred claims upon said sinking fund and also for the payment of such other bonds and stocks of said city as by said section two hundred and thirteen of this act are authorized to be paid from said sinking fund. Whenever, and as often as the commissioners of the sinking fund shall certify to the board of estimate and apportionment that the said surplus revenues of said sinking fund will, in the opinion of said commissioners, be less than the amount by this section required to be set apart or paid over to said commissioners for the purposes aforesaid, and certifying the amount of such deficiency, it shall be the duty of said board of estimate and apportionment and the board of aldermen to include in the annual budget for the year next ensuing to be raised by tax on the estates, real and personal, in said city subject to taxation, the amount of the deficiency certified as aforesaid, and this amount so raised by tax shall be paid to the commissioners of the sinking fund on the first day of November of the year in which the same shall be levied. (*As amended by L. 1910, ch. 683.*)

§ 230. Items to be included in annual estimate; for maintenance of buildings. (See 3d Ed., p. 165.)

Par. Second.

4. The Brooklyn Institute of Arts and Sciences. (*As amended by L. 1907, ch. 43.*)

Par. Ninth.

2. To the New York Society for the Prevention of Cruelty to Children, the sum of thirty thousand dollars, for the uses and purposes of said society; to the Legal Aid Society, a sum not exceeding twenty-five thousand dollars, for the uses and purposes of said society. (*As amended by L. 1907, ch. 680.*)

9. To the Nursery and Child's Hospital, the sum of five dollars per week for every destitute woman admitted into its lying-in wards, according to the time of the said woman's continuing under the care of the said institution, and the further sum of ten dollars per month for each and every child born in the institution or supported and maintained by said institution, whenever it may be necessary or expedient to place said child in the country, or for want of room

in the institution to find accommodation for it elsewhere; and also the sum of ten dollars per month for all children received and retained in the Nursery and Child's Hospital, in The City of New York, and in like proportion for any fraction of a year for each and every destitute child which may be supported and maintained in said institution. To the New York Polyclinic Medical School and Hospital, for board, nursing and medical or surgical aid and attendance, one dollar per day for each needy and charity patient who occupies a bed in said hospital and who receives such care, support and maintenance; such payments not to exceed in the aggregate thirty thousand dollars per annum. To the New York Homeopathic College and Hospital, for board, nursing and medical or surgical aid and attendance, one dollar per day for each needy and charity patient who occupies a bed in the Flower Surgical Hospital, belonging to the said New York Homeopathic College and Hospital, and who receives such care, support and maintenance; such payment not to exceed in the aggregate twelve thousand dollars per annum. To the International Sunshine Branch for the Blind, the sum of one dollar per day for the support, care and instruction of each needy child between the ages of one and eight years that shall be received, entrusted or committed to the said International Sunshine Branch for the Blind; and the number of such children so received, entrusted or committed to the said International Sunshine Branch for the Blind shall be ascertained by the examination and testimony, under oath, of the president or secretary of said International Sunshine Branch for the Blind; such payments not to exceed in the aggregate fifteen thousand dollars per annum. (*As amended by L. 1908, ch. 65.*)

Charitable institutions distinguished.

The New York Society for the Prevention of Cruelty to Children, is not a charitable institution, but performs duties which otherwise would be devolved upon the police department of the city, and therefore the provision of this section directing the city to pay to it annually the sum of \$30,000 does not place it under the jurisdiction of the State Board of Charities. People *ex rel.* State Board of Charities *v.* N. Y. Society for Prevention of Cruelty to Children, 161 N. Y. 233, rev'g 42 App. Div. 83, 58 N. Y. Supp. 953.

See cases cited under § 226, *ante*.

§ 231. Board of estimate and apportionment to audit charges against city for costs, etc. (See 3d Ed., p. 175.)

The provisions of this section authorizing the board of estimate and apportionment to audit and allow as a charge against the city, the reasonable expense incurred by the officers therein named in defending proceedings to remove them, is not merely permissive in form, but imposes upon the board of

estimate and apportionment, the duty of taking the matter under consideration and determining it upon the merits. The amount to be allowed if any, however, is entirely within the discretion of the board of estimate and apportionment. *Matter of Deuel v. Gaynor*, 141 App. Div. 630, 126 N. Y. Supp. 112.

The office of justice of the Court of Special Sessions, although not specifically named in this section, nevertheless is within its provisions, and the board of estimate and apportionment, therefore, has the power to act upon the application of a justice of said court for the audit and allowance as a charge against the city, of the reasonable expense incurred by him in successfully defending a proceeding to remove him from office. *Matter of Deuel v. Gaynor*, 141 App. Div. 630, 126 N. Y. Supp. 112.

§ 237. Board of estimate may transfer excess of appropriations. (See 3d Ed., p. 176.)

After the adoption of the annual budget, the only way by which provision can be made for the payment of salaries of positions legally created and for which salaries have been fixed by the board of aldermen under § 56, *ante*, but for which no appropriation has been specially made in the budget, is by the transfer by the board of estimate and apportionment of the unexpended balance of the sum appropriated by the budget for other positions which have been abolished, to the payment of such salaries. *Colihan v. Miller*, 72 Misc. 140, 131 N. Y. Supp. 99.

§ 242. Board of estimate and apportionment; powers with respect to certain subjects. (See 3d Ed., p. 179.)

Private railroads.

The board of estimate and apportionment has no authority to grant to the proprietors of a department store a permit to lay down private railroad tracks in front of their premises and operate express cars thereon for the conveyance of goods to their store from the street railroads, the power of that board being no greater than theretofore vested by the board of aldermen in relation to the granting of franchises; and an adjoining owner whose property will be damaged thereby is entitled to an injunction restraining the taking of any steps under a permit improperly granted. *Hatfield v. Straus*, 189 N. Y. 208, *aff'd* 117 App. Div. 671, 102 N. Y. Supp. 934. See also cases cited under § 73, *ante*.

Board of estimate; power to exchange lands under water no longer used for public purposes. (New.)

§ 245a. The board of estimate and apportionment shall have power to lay out sewer drainage canals and acquire title to lands necessary therefor, by exchanging and conveying lands under water

in creeks, tributaries thereto, ditches, ponds and bays no longer required by The City of New York for public purposes, for lands of private owners within the lines of the sewer drainage canal so laid out, and to take deeds and conveyances, but no such exchange shall be made to or with any owner or owners whose upland does not abut, bound or adjoin the lands under water to be exchanged, nor shall the said board of estimate and apportionment make such exchange of said lands under water until such department, board, commission, body or officer of The City of New York having under control or supervision the said lands under water, shall have first certified to the board of estimate and apportionment that the said lands to be exchanged are no longer necessary or are required for public purposes, and in the exchange of said lands all right, title and interest of private owners in that portion of creeks, tributaries thereto, ditches, ponds and bays not abutting, bounding or adjoining lands under water so exchanged, shall be deeded and delivered to The City of New York, and by resolution the said board of estimate and apportionment shall authorize such exchange, and the corporation counsel of The City of New York shall thereupon, by the direction of the board of estimate and apportionment, prepare and certify the forms of all legal instruments and deeds necessary on the part of The City of New York to effect such exchange in law, and the said board of estimate and apportionment shall designate and authorize the proper official or officials to execute and deliver all legal instruments and deeds necessary to effect such exchange as aforesaid. The land so acquired by the exchange shall be assigned to the department requiring the use of the same, upon proper application therefor. (*Added by L. 1909, ch. 516.*)

Powers of former boards as to sale of lands, et cetera, under water vested in board of estimate. (New.)

§ 245b. All acts, powers and proceedings relating to selling, transferring, or exchanging of the lands under water in the creeks, tributaries thereto, ditches, ponds and bays, and such other powers as are set forth in chapter six hundred and thirty-eight of the laws of eighteen hundred and ninety-five, are hereby devolved upon and such authority as is set forth in said chapter is hereby vested in the board of estimate and apportionment of The City of New York. (*Added by L. 1909, ch. 516.*)

Id.; inconsistent acts repealed. (New.)

§ 245c. All acts inconsistent herewith are hereby repealed. (*Added by L. 1909, ch. 516.*)

Claims against city; power of board of estimate to pay or compromise on equitable grounds, although illegal.
(New.)

§ 246. The board of estimate and apportionment may, in its discretion inquire into, hear and determine any claim against The City of New York which has been certified to said board in writing by the comptroller as an illegal or invalid claim against the city, but which, notwithstanding, in his judgment it is equitable and proper for the city to pay in whole or in part, and if upon such inquiry the board by an unanimous vote determines that the city has received a benefit and is justly and equitably obligated to pay such claim and that the interests of the city will be best subserved by the payment or compromise thereof, it may authorize the comptroller to pay the claim and the comptroller shall thereupon pay the claim in such amount as the board of estimate and apportionment shall so determine to be just, in full satisfaction of such claim, provided that the claimant shall fully release the city upon any such payment, in such form as shall be approved by the corporation counsel. The provisions of this section shall not authorize the audit or payment of any claim barred by the statute of limitations, nor any claim for services performed under an appointment in violation of any provision of the civil service law. For the purpose of carrying out the provisions of this section, it shall be the duty of the comptroller of The City of New York on being thereunto authorized by the said board of estimate and apportionment to issue and sell corporate stock or certificates of indebtedness or other evidences of indebtedness, issued pursuant to the provisions of section one hundred and eighty-seven of this act, of The City of New York in such amounts as may be necessary and at such a rate of interest as may be fixed by said comptroller. No consent or approval of any board or public body other than the said board of estimate and apportionment shall be necessary to authorize the comptroller to issue such stock or certificates of indebtedness or other evidences of indebtedness, issued pursuant to the provisions of section one hundred and eighty-seven of this act, for the purposes of this section. (*As amended by L. 1910, ch. 683.*)

Allowance of invalid claims.

The provisions of this section authorize the board of estimate and apportionment to consider and order payment of such claims only as have been rectified to it by the comptroller as an "illegal or invalid claim, but which notwithstanding in his judgment it is equitable and proper for the city to pay in whole or part." *People ex rel. Dady v. City of New York*, 144 App. Div. 308, 128 N. Y. Supp. 1082, mod'f'd 203 N. Y. 1.

Whether a claim should be certified or not by the comptroller, rests in his discretion, which cannot be controlled by the court. Where, however, the comptroller refuses to investigate and certify a claim, solely upon the ground that he has no legal power to do so, he may be compelled by mandamus to exercise his official discretion and investigate the claim and if in his judgment it is equitable and proper for the city to pay the same to so certify to the board of estimate and apportionment. *People ex rel. Dady v. City of New York*, 203 N. Y. 1, modf'g 144 App. Div. 308, 128 N. Y. Supp. 1082.

It seems that the board of estimate and apportionment under this section would have no power to determine and pay claims which are invalid or void because they do not arise from the performance "of a city purpose." *People ex rel. Dady v. City of New York*, 144 App. Div. 308, 128 N. Y. Supp. 1082, modf'd 203 N. Y. 1. As to what has been held not to be a city purpose within the rule see, *Chapman v. City of New York*, 168 N. Y. 80; *Stemmler v. Mayor, etc.*, 179 N. Y. 473; *Matter of Jensen*, 44 App. Div. 509, 60 N. Y. Supp. 933; *Matter of Straus*, 44 App. Div. 425, 61 N. Y. Supp. 37.

The provision of the State constitution which prohibits the legislature from authorizing the re-examination and payment of a claim which has been adjudged to be inherently invalid by the courts, has no application to a case in which a judgment has been rendered against a contractor with the city not upon the merits but because of the failure on the part of the city to comply with the various statutory provisions relating and controlling the letting of contracts. Accordingly, where the comptroller refused to certify the claim of a contract which had been held by the courts to be unenforceable because of the failure of the city to comply with the statutory provisions governing the letting of contracts and such refusal was based solely upon the ground that the provisions of this section were inapplicable, *held*, that the contention of the comptroller was untenable; that the provisions of this section were applicable to the claim and that mandamus would lie to compel the comptroller to consider the same and if he deemed it meritorious, to certify it to the board of estimate and apportionment. *People ex rel. Dady v. City of New York*, 203 N. Y. 1, modf'g 144 App. Div. 308, 128 N. Y. Supp. 1082.

Board of estimate and apportionment; power with respect to certain public improvements. (New.)

§ 247. Before a public improvement of any kind (except an improvement to be made pursuant to the rapid transit act) involving the acquisition or the physical improvement of property for streets, public places, parks, bridges, approaches to bridges, for the disposal and treatment of sewage or the improvement of the waterfront, or involving both such acquisition and physical improvement of property, which acquisition or physical improvement, or both, is estimated to cost the sum of fifty thousand dollars or more, shall be authorized, the board of estimate and apportionment may determine in what man-

ner and in what shares and proportions the cost and expense of the acquisition or physical improvement, or both, shall be paid by The City of New York, by one or more boroughs thereof, by a part or portion of one or more boroughs thereof, or by the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises not required for the said improvement, which said board shall deem peculiarly benefited thereby.

If said board shall determine that the cost of such acquisition or physical improvement, or both, shall be apportioned between or among The City of New York, one or more boroughs thereof, a part or portion of one or more boroughs thereof, or the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises not required for the said improvement, which said board shall deem peculiarly benefited thereby, the said board may also determine in what manner and in what proportion the cost and expense of such acquisition or physical improvement, or both, shall be borne either by The City of New York, by one or more boroughs thereof, by a part or portion of one or more boroughs thereof, or by the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises not required for the said improvement, which said board shall deem peculiarly benefited thereby.

The said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing, to be published for ten consecutive days in the City Record. After the due publication of such notice and after hearing protests and objection, if any there be, the said board may make such determination.

In case said board shall determine that the cost of such acquisition or physical improvement, or both, shall be paid in whole or in part by a borough or boroughs, the said board may also, in its discretion, determine that all or any part or portion of such cost and expense, both for the acquisition of property and the cost of the physical improvement shall be levied and collected with the taxes upon the real property in said borough or boroughs becoming due and payable in the year in which the cost and expense of the improvement shall have been fixed and determined or in the next succeeding year. When the cost and expense of such an improvement which is thus to be levied and collected shall have been apportioned, fixed and determined, the comptroller of The City of New York shall certify to the board of assessors, the department of taxes and assessments and such

other boards, departments and officers as may be necessary, the amount to be collected and the area upon which such cost and expense is to be imposed.

When the board of estimate and apportionment shall have determined that all or any part or portion of the cost and expense of any such improvement shall be levied and collected with the annual taxes as above provided for, then all provisions of law with reference to the imposing, levying and collecting of taxes and assessments and the penalties for the non-payment thereof shall be applicable thereto.

In the discretion of the board of estimate and apportionment it may direct that the cost and expense of such an improvement which is to be paid in whole or in part by the city or by a portion of the city, or by a borough or boroughs or by a portion of a borough or boroughs, or by the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises not required for the said improvement which said board shall deem peculiarly benefited thereby, may be assessed upon the property benefited by such improvement and that such assessment may be payable in equal yearly installments not exceeding five. Such an assessment, whether payable in one payment or in installments, shall be and become a lien for the whole amount thereof upon the property affected thereby at the time and in the manner specified in section ten hundred and seventeen of this act. When the board shall determine that such an assessment may be paid in installments, then the first installment of such an assessment, with interest thereon at the rate of five per centum per annum from the date of confirmation thereof, shall be due and payable one year from the date when it became a lien and the remaining installments, with such interest, shall be due and payable annually thereafter. Any installment may be paid at any time with interest at the rate of five per centum per annum to the date of payment. If any such installment be not paid within three years after the date when the same is due and payable, the entire assessment shall become due and payable and must be collected and the tax lien therefor may be sold and enforced.

Upon affording persons interested an opportunity to be heard as herein provided, the board of estimate and apportionment may, in its discretion, reconsider its action with respect to proceedings now pending involving an estimated expenditure of upward of fifty thousand dollars, the assessment for which has not been confirmed, and may make a new determination concerning the same in conformity with the provisions of this section.

The comptroller is authorized to borrow, from time to time, on the

credit of the corporation, in anticipation of the collection of the cost and expense of any such acquisition or physical improvement, such sums as may be necessary to meet expenditures to be made therefor, and issue for the moneys so borrowed certificates of indebtedness or other evidence of indebtedness to be redeemed in the same manner as similar obligations of said corporation. (*Added by L. 1911, ch. 679.*)

§ 255. Corporation counsel to be the head of the law department; duties; salary. (See 3d Ed., p. 185.)

Appointment of assistant corporation counsel, etc.

The classification by the Municipal Civil Service Commission in the non-competitive class of the positions of deputy assistant city attorneys, managing clerk, registrar and detectives in the law department, is a matter within the discretion of the Civil Service Commission, and as the question as to whether they should be in the competitive or non-competitive class is a matter of opinion, and not a strict question of law, mandamus does not lie to compel the commissioners to change their determination. *Matter of Hammond v. Ricker*, 140 App. Div. 19, 124 N. Y. Supp. 406.

Powers of corporation counsel.

A municipal corporation is authorized to sue and to be sued by its corporate name; and where an action is brought by a city in its corporate name, by its proper law officers, it will be presumed that the action is authorized until the contrary appears. *City of Syracuse v. Roscoe*, 66 Misc. 317, 123 N. Y. Supp. 403.

This section contemplates that the various boards and offices of the city should be represented by the corporation counsel. Accordingly an individual member of the board of estimate cannot appear by his own attorney in an action brought by a taxpayer against the board of estimate as a whole to restrain it from committing the city to certain proposed contracts for public improvements, where he is not named individually as a party to the proceeding and is not individually directed to do or refrain from doing any acts connected therewith. *Levy v. McClellan, Blanchard, J.*, New York Law Jour., July 14th, 1908, *aff'd* 132 App. Div. 913, 116 N. Y. Supp. 1087, *aff'd* 196 N. Y. 178.

Where pending proceedings against the borough president to compel the reinstatement of a member of the department, the borough president is removed by the governor, the proceeding cannot be continued until his successor has been appointed, and an inquest taken after his removal and before the appointment of a successor is a nullity, although the corporation counsel appeared upon the inquest since the authority to appoint and remove the member of the department was not vested in the city and the appearance of the corporation counsel was merely pursuant to his duty to advise the bor-

ough president. *People ex rel. Collins v. Ahearn*, No. 1, 137 App. Div. 260, 121 N. Y. Supp. 966.

The provision of this section that the corporation counsel shall not offer or confess judgment against the city without the previous written approval of the comptroller, *held*, not applicable to an offer of judgment on a claim against the board of education and the comptroller cannot refuse to pay such judgment on the ground that he was not consulted about the advisability of tendering judgment. *Matter of Simpson v. Prendergast*, Sp. T., *Lehman, J.*, N. Y. Law Jour., July 19th, 1911.

Presentation of claims against city to be pleaded. (See 3d Ed., p. 191.)

§ 261. No action or special proceeding, for any cause whatever, shall be prosecuted or maintained against The City of New York, unless it shall appear by and as an allegation in the complaint or necessary moving papers that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the comptroller of said city for adjustment, and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment; and in the case of claims against said city, accruing after the passage of this act, for damages for injuries to personal property, or for the destruction thereof, alleged to have been sustained by reason of the negligence of, or by the creation or maintenance of a nuisance by, said city, or any department, board, officer, agent or employee thereof, no action thereon shall be maintained against said city unless such action shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action and of the time when and place where the damages were incurred or sustained, together with a verified statement showing in detail the property alleged to have been damaged or destroyed, and the value thereof, shall have been filed with the comptroller of said city within six months after such cause of action shall have accrued. (*As amended by L. 1907, ch. 677.*)

Presentation of claims to the comptroller.

It seems that the provisions of this section, requiring presentation of a claim before suit, would have no application to an action in equity brought to restrain the city from maintaining a nuisance constituting a continuing invasion of property. *Penfield v. City of New York*, 115 App. Div. 502, 101 N. Y. Supp. 442.

The provisions of this section requiring presentation of a claim to the comptroller before suit affects merely the remedy, and does not affect the liability of the city to pay or the date from which interest should be allowed.

Roebeling v. City of New York, 110 App. Div. 366, 97 N. Y. Supp. 278. To same effect Bernreither v. City of New York, 123 App. Div. 291, 107 N. Y. Supp. 1006, aff'd 196 N. Y. 506, rev'g 55 Misc. 130, 106 N. Y. Supp. 286.

The filing of a claim with the corporation counsel is not a compliance with the provisions of this section requiring the presentation of claims against the city to the comptroller and is ineffective unless such notice has been acted upon by the comptroller. Watts v. City of New York, 133 App. Div. 400, 117 N. Y. Supp. 612.

The presentation of a claim to the comptroller, being a condition precedent to the existence of a cause of action, must be set up in the complaint, or a cause of action is not alleged. Watts v. City of New York, 133 App. Div. 400, 117 N. Y. Supp. 612; Mack Paving Co. v. City of New York, 142 App. Div. 702, 127 N. Y. Supp. 738.

Where an oral complaint in the municipal court was defective in failing to set forth the presentation of the claim to the comptroller, but the parties stipulated at the beginning of the trial, that the notice of claim had been duly served on the comptroller nearly three years before the institution of the action, *held* that the complaint would be amended on appeal to conform to the proof. Maisch v. City of New York, 134 App. Div. 201, 118 N. Y. Supp. 908.

Where a judgment was rendered in favor of the city by the municipal court upon the ground that the complaint did not set forth that the plaintiff had presented his claim to the comptroller, *held* that the court was without jurisdiction to vacate and set aside the judgment and to amend the complaint by inserting the necessary allegations. Watts v. City of New York, 133 App. Div. 400, 117 N. Y. Supp. 612.

Where the answer of the city denied any knowledge or information sufficient to form a belief as to the allegation in the complaint that the claim had been presented to the comptroller, *held*, that the answer was not frivolous and was sufficient to raise an issue. Mack Paving Co. v. City of New York, 142 App. Div. 702, 127 N. Y. Supp. 738; *contra*, Conway v. City of New York, 139 App. Div. 446, 124 N. Y. Supp. 660.

The examination by the comptroller of a plaintiff in an action against the city, held not to constitute a waiver of the requirement of this section that claims against the city must be presented to comptroller where the complaint fails to allege either an express waiver or facts which taken together constitute a waiver on the part of the city. Watts v. City of New York, 133 App. Div. 400, 117 N. Y. Supp. 612.

The provision of this section which allows an action against the city only where the comptroller has neglected to pay a claim within thirty days after it is presented, contemplates that thirty days is the reasonable time within which the city shall pay its obligations. Accordingly the city is not guilty

of a breach of contract as a matter of law in failing to pay an installment under a contract sixteen days after it becomes due, especially where all prior payments have been delayed within ten and thirty days without objection. *Williams v. City of New York*, 130 App. Div. 182, 114 N. Y. Supp. 653.

Injuries to personal property.

The provision of this section which prohibits the maintenance of an action against the city for damages for injuries to personal property unless such action is commenced within one year after the cause of action has accrued and notice of intention to commence such action be filed with the comptroller within six months after the action accrued, applies only to actions for damages for injuries to personal property or its destruction through negligence. Accordingly, where the owner of a scow rented it to the city and the same was damaged as a result of the negligence of the city and the owner brought an action against the city upon the contract of bailment and not upon the theory of negligence, *held*, that the provisions of the statute were inapplicable. *Harms v. City of New York*, 69 Misc. 315, 125 N. Y. Supp. 477.

An action against the city for injury to personal property is barred unless brought within one year after the cause of action accrued, and the fact that a previous suit had been brought against the city by the same plaintiff and dismissed for lack of jurisdiction does not revive the cause of action where it does not appear that the former action was for the same cause or that it was commenced within one year. *Thomas v. City of New York*, 123 N. Y. Supp. 113.

Presentation of claims for personal injuries.

The fact that this section of the charter requires claims for personal injuries to be presented to the comptroller for his consideration does not excuse a non-compliance with the provisions of L. 1886, ch. 572, requiring the presentation of such claims and notice of intention to sue thereon to the corporation counsel. The two requirements are not inconsistent but distinct conditions to the commencement of an action, and the failure to comply with either would bar the right to recovery. *Bernreither v. City of New York*, 123 App. Div. 291, 107 N. Y. Supp. 1006, *aff'd* 196 N. Y. 506, *rev'g* 55 Misc. 130, 106 N. Y. Supp. 286; *Watts v. City of New York*, 133 App. Div. 400, 117 N. Y. Supp. 612.

The notice of intention to sue the city for personal injuries required by L. 1886, ch. 572, must set forth the time and place of the accident. The statute does not require that they be stated with literal nicety or exactness, but it does require such a statement as will enable the municipal authorities to locate the place and fix the time of an accident. When a notice contains the information necessary for that purpose it is a substantial compliance with the statute, but when it falls short of that test, it is insufficient. *Purdy v. City of New York*, 193 N. Y. 521, *rev'g* 126 App. Div. 320, 110 N. Y. Supp. 822.

A notice containing the statement "Whilst walking along the sidewalk on Milford Street, Borough of Brooklyn, in the night time I was caused to fall

into an opening, gully or trench running across said sidewalk" does not sufficiently designate the place of the accident, since Milford Street is at least a mile in length and the description of the opening is such that its location is a matter of conjecture, rather than proof. *Purdy v. City of New York*, 193 N. Y. 521, rev'g 126 App. Div. 320, 110 N. Y. Supp. 822. To the same effect see *Carson v. Village of Dresden*, 202 N. Y. 414.

The retention by the corporation counsel of a defective notice of intention to sue, under L. 1886, ch. 572, without objection as to its sufficiency, does not constitute a waiver on the part of the city of the right to rely upon the defects in the notice as a defense to the action. The statute does not impose upon the law officer of the city the active duty of calling to the attention of the claimant or his counsel, the defects in the notice of intention to sue in time to enable them to remedy the same. *Purdy v. City of New York*, 193 N. Y. 521, rev'g 126 App. Div. 320, 110 N. Y. Supp. 882. To same effect see *Carson v. Village of Dresden*, 202 N. Y. 414.

Where the complaint in an action to recover against a municipality for negligence causing a death alleges the filing of a notice of intention to commence action, as required by the statute, a denial of any knowledge or information sufficient to form a belief as to the allegation is frivolous and insufficient to raise that issue. *Bogart v. City of New York*, 128 App. Div. 139, 112 N. Y. Supp. 549. To same effect see, *Borough Construction Co. v. City of New York*, 131 App. Div. 278, 115 N. Y. Supp. 697, where it was held that the denial by the city of any knowledge or information sufficient to form a belief of the allegations of the complaint that a claim was duly presented to the comptroller was frivolous and raised no issue.

The cause of action for death by negligence given by Code Civ. Pro., § 1903, does not accrue until letters of administration have been issued. Accordingly, the filing of notice of intention to sue under L. 1886, ch. 572, within six months after letters of administration were issued, constituted a compliance with the statute notwithstanding that the notice was filed more than six months after the death of the injured person. *Conway v. City of New York*, 139 App. Div. 446, 124 N. Y. Supp. 660. See *contra*, *Mack Paving Co. v. City of New York*, 142 App. Div. 702, 127 N. Y. Supp. 738.

The period of six months within which notice of intention to sue must be filed with the corporation counsel begins to run from the date of the accident. So *held*, holding a contention that such period begins to run thirty days after the presentation of a claim to the comptroller under this section of the charter to be untenable. *Bernreither v. City of New York*, 123 App. Div. 291, 107 N. Y. Supp. 1006, aff'd 196 N. Y. 506, rev'g 55 Misc. 130, 106 N. Y. Supp. 286.

The omission to file a claim within the prescribed period may be excused by the mental or physical incapacity of the claimant to give such notice resulting from the injury upon which such claim is based. But the notice must

be filed within a reasonable time after the claimant sufficiently recovers to comply with the statute. The question as to what is a reasonable time is one for the jury. *Forsythe v. City of Oswego*, 191 N. Y. 441, rev'g 114 App. Div. 616, 99 N. Y. Supp. 1022.

The short statute of limitations contained in L. 1886, ch. 572, barring actions against the city for personal injuries unless brought within one year from the time the actions accrued, is subject to suspension during the existence of any of the disabilities specified in Code Civ. Pro., § 396, e. g., infamy. *McKnight v. City of New York*, 186 N. Y. 35, rev'g 98 App. Div. 622, 90 N. Y. Supp. 1105.

§ 262. Jurisdiction of actions against the city. (See 3d Ed., p. 195.)

The city court of The City of New York has no jurisdiction over an action in which the city is a party defendant. The omission from this section of the provision contained in the charter of 1897 conferring upon the Supreme Court exclusive jurisdiction of actions against the city was necessary to meet the change made by the charter of 1901, conferring jurisdiction upon the municipal court over such actions, and was not intended to confer a similar jurisdiction upon the city court. *O'Connor v. City of New York*, 191 N. Y. 238, aff'g 120 App. Div. 875, 105 N. Y. Supp. 1134, aff'g 51 Misc. 560, 101 N. Y. Supp. 295.

To same effect see *Maisch v. City of New York*, 193 N. Y. 460, aff'g 127 App. Div. 424, 111 N. Y. Supp. 645, holding that the county court of Kings County has no jurisdiction of an action against The City of New York.

§ 265. Bills of costs in condemnation proceedings. (See 3d Ed., p. 196.)

The provisions of L. 1905, ch. 725, providing for acquisition of property for water supply, did not repeal the provisions of this section that the fees of commissioners in proceedings for the condemnation of lands for public purposes shall not be taxed prior to the confirmation of their report. *Matter of City of New York*, 140 App. Div. 203, 124 N. Y. Supp. 1053.

Police commissioner; salary; deputies; salaries, etc. (See 3d Ed., p. 199.)

§ 270. The head of the police department shall be called the police commissioner, who shall be appointed by the mayor, and shall, unless sooner removed, hold office for the term of five years, and until his successor shall be appointed and has qualified. The said commissioner may, whenever, in the judgment of the mayor of said city or the governor, the public interests shall so require, be removed from office by either, and shall be ineligible for reappointment thereto. The successors in office of the said commissioner shall also be ap-

pointed by the mayor of the city within ten days after any vacancy shall occur, and shall be removed by either the mayor or governor whenever the public interests so require. The salary of said police commissioner shall be seventy-five hundred dollars a year. The said commissioner shall have the power to appoint, from the citizens of the United States and residents of the said city, and at pleasure remove, four deputies, to be known as first deputy commissioner, second deputy commissioner, third deputy commissioner, and fourth deputy commissioner. The first deputy commissioner shall, during the absence or disability of the commissioner, possess all the powers and perform all the duties of the commissioner except the power of making appointments and transfers. In the absence or disability of both the commissioner and the first deputy commissioner, the second deputy commissioner shall possess all the powers and perform all the duties of the commissioner except the power of making appointments and transfers. In the absence or disability of the commissioner, the first deputy commissioner and the second deputy commissioner, the third deputy commissioner shall possess all the powers and perform all the duties of the commissioner except the power of making appointments and transfers. In the absence or disability of the commissioner, the first deputy commissioner, the second deputy commissioner and the third deputy commissioner, the fourth deputy commissioner shall possess all the powers and perform all the duties of the commissioner except the power of making appointments and transfers. The commissioner shall define the duties of the deputy commissioners, and may delegate to either of them any of his powers except the power of making appointments and transfers. The salary of each of said deputy commissioners shall be four thousand dollars a year. The board of estimate and apportionment may from time to time, in its discretion, increase the salaries of the police commissioner, the first deputy commissioner, the second deputy commissioner, the third deputy commissioner and the fourth deputy commissioner, or the salary of either of them. The comptroller of The City of New York is hereby authorized and directed to issue special revenue bonds under the provisions of section one hundred and eighty-eight of chapter four hundred and sixty-six of the laws of nineteen hundred and one in an amount sufficient to provide for the payment of the salary of the fourth deputy commissioner during the current fiscal year, and to provide for the payment of the increases, if any, which may be made in the salaries of the police commissioner, the first deputy commissioner, the second deputy commissioner, the third deputy commissioner and the fourth deputy commissioner during the current fiscal year. (*As amended by L. 1907, ch. 469.*)

§ 272. Police commissioner; to make and enforce rules and regulations. (See 3d Ed., p. 200.)

Power to make rules.

Under this section, the police commissioner is authorized "to make such rules, orders, and regulations," as may be reasonably necessary to effect a prompt and efficient exercise of all powers conferred upon him by law. If no power is conferred upon him by law in this regard, any rule which he may promulgate respecting the same is utterly void. *People ex rel. Gow v. Bingham*, 57 Misc. 66, 107 N. Y. Supp. 1011.

Photographs of arrested persons.

The police commissioner has no power under this section to prescribe that a party charged with a criminal offense should prior to his conviction, have his photograph taken and measurements and an inspection of his body made for the purpose of preserving them in the criminal records of the police department. *People ex rel. Gow v. Bingham*, 57 Misc. 66, 107 N. Y. Supp. 1011.

Where a person whose photograph was taken by the police department, before his conviction, applied for a peremptory writ of mandamus compelling the police officials having the control and custody of photographs, etc., to destroy the same, *held*, that mandamus was not the appropriate remedy. *People ex rel. Gow v. Bingham*, 57 Misc. 66, 107 N. Y. Supp. 1011.

§ 273. Boards and officers abolished and forces consolidated.
(See 3d Ed., p. 200.)

By virtue of this section, which became of force January 1, 1908, all of the police forces then existing within the area of the greater city were consolidated into one department and continued under a single management. *People ex rel. Murphy v. Bingham*, 130 App. Div. 112, 114 N. Y. Supp. 702, *aff'd* 196 N. Y. 519.

Police force; composition. (See 3d Ed., p. 202.)

§ 276. Until otherwise provided by the board of estimate and apportionment, upon the recommendation of the mayor and the police commissioner, the police force in the police department created by this chapter, shall consist of the following members, to-wit: Captains of police, not exceeding in number one to each fifty of the total number of patrolmen, except in the rural portion of the city, in addition to the number detailed to act as inspectors, as hereinafter provided; lieutenants of police, not exceeding four in number to each fifty of the total number of patrolmen; sergeants not exceeding four in number to each fifty patrolmen; the members of the telegraph force as specified in section two hundred and seventy-seven of this act, the telegraph operators to rank as lieutenants of police; the superin-

tendents and inspectors of boilers as specified in section three hundred and forty-two of this act; doormen of police not exceeding two in number to each fifty of the total number of patrolmen; surgeons of police, not exceeding forty in number, one of whom shall be chief surgeon; and patrolmen to the number of seven thousand eight hundred and thirty-nine. The deputy chiefs of police who shall have been in said office prior to April twenty-second, nineteen hundred and one, shall become captains of police, with the salaries of deputy chiefs, and the rights granted to deputy chiefs in respect to the relief pension fund. The rank or grade of inspector of police is hereby abolished and the inspectors of police who hold such office when this act takes effect shall become captains of police with the same salaries and the same rights in respect to the relief pension fund as inspectors of police were entitled to on the first day of February in the year nineteen hundred and seven. Those members of the police force who have heretofore been designated as sergeants of police shall hereafter be designated as lieutenants of police, and those members of the police force who have heretofore been designated as roundsmen shall hereafter be designated as sergeants. This change in the designation of ranks or grades shall in no way affect the respective rights as to pay and pension of those members of the police force in those ranks or grades which are hereby renamed. (*As amended by L. 1907, ch. 160.*)

Telegraph operators.

The provision of this section as amended by L. 1907, ch. 160, declaring that telegraph operators in the police department shall have the rank of lieutenants of the police, does not apply to patrolmen who prior to the enactment of the amendment were temporarily assigned to duty in the telegraph bureau, and continued in such duty without having passed a civil service examination for promotion to the rank of sergeant, or telegraph operator, or lieutenant. Such temporary appointee is not entitled to the salary of a lieutenant. *People ex rel. Murphy v. Bingham*, 130 App. Div. 112, 114 N. Y. Supp. 702, *aff'd* 196 N. Y. 519.

Police force; qualifications of members; publishing names and residence of applicants and appointees. (See 3d Ed., p. 207.)

§ 284. No person shall be appointed or reappointed to membership in the police force or continue to hold membership therein, who is not a citizen of the United States or who has ever been convicted of felony, or who cannot read and write understandingly the English language, or who shall not have resided within the state, one year next preceding his appointment, but skilled officers of experience may be appointed for detective duty who have not resided as herein

required. No person shall be appointed patrolman who shall be at the date of placing his name on the civil service eligible list over thirty years of age; no person shall be appointed doorman who shall be at the date of placing his name on the civil service eligible list over thirty-five years of age; and no person who shall have been a member of the force, and shall have been dismissed therefrom, shall be reappointed. The name, residence and occupation of each applicant for appointment or reappointment to any position in the police department, as well as the name, residence and occupation of each person appointed to any position, shall be published, and such publication shall, in every instance, be made, on the Saturday next succeeding

tendents and inspectors of boilers as specified in section three hundred and forty-two of this act; doormen of police not exceeding two in number to each fifty of the total number of patrolmen; surgeons of police, not exceeding forty in number, one of whom shall be chief surgeon; and patrolmen to the number of seven thousand eight hundred and thirty-nine. The deputy chiefs of police who shall have been in said office prior to April twenty-second, nineteen hundred and one, shall become captains of police, with the salaries of deputy chiefs, and the rights granted to deputy chiefs in respect to the relief pension fund. The rank or grade of inspector of police is hereby abolished

Police force; qualifications of members; publishing names and residence of applicants and appointees.

§ 284. No person shall be appointed or reappointed to membership in the police force or continue to hold membership therein, who is not a citizen of the United States or who has ever been convicted of felony, or who cannot read and write understandingly the English language, or who shall not have resided within the state, one year next preceding his appointment, but skilled officers of experience may be appointed for detective duty who have not resided as herein required. No person shall be appointed patrolman who shall be at the date of the filing of his application for civil service examination over twenty-nine years of age; no person shall be appointed doorman who shall be at the date of placing his name on the civil service eligible list over thirty-five years of age; and no person who shall have been a member of the force, and shall have been dismissed therefrom, shall be reappointed. The name, residence and occupation of each applicant for appointment or reappointment to any position in the police department, as well as the name, residence and occupation of each person appointed to any position, shall be published, and such publication shall, in every instance, be made on the Saturday next succeeding such application, or appointment, in the City Record. Preliminary to a permanent appointment as patrolman there shall be a period of probation for such time as is fixed by the civil service rules, and no person shall receive a permanent appointment who has not served the required probationary period, but the service during probation shall be deemed to be service in the uniformed force, if succeeded by a permanent appointment, and as such shall be included and counted in determining eligibility for advancement, promotion, retirement and pension, as hereinafter provided. (*As amended by L. 1912, ch. 480.*)

§ 348. (Police board authorized to grant licenses to bookers of emigrant passengers or persons taking money for their inland fare or for the transportation of their baggage.) *Repealed by L. 1912, ch. 429.*

required. No person shall be appointed patrolman who shall be at the date of placing his name on the civil service eligible list over thirty years of age; no person shall be appointed doorman who shall be at the date of placing his name on the civil service eligible list over thirty-five years of age; and no person who shall have been a member of the force, and shall have been dismissed therefrom, shall be reappointed. The name, residence and occupation of each applicant for appointment or reappointment to any position in the police department, as well as the name, residence and occupation of each person appointed to any position, shall be published, and such publication shall, in every instance, be made, on the Saturday next succeeding such application, or appointment, in the City Record. Preliminary to a permanent appointment as patrolman there shall be a period of probation for such time as is fixed by the civil service rules, and no person shall receive a permanent appointment who has not served the required probationary period, but the service during probation shall be deemed to be service in the uniformed force, if succeeded by a permanent appointment, and as such shall be included and counted in determining eligibility for advancement, promotion, retirement and pension, as hereinafter provided. (*As amended by L. 1907, ch. 278.*)

Summary powers of commissioner.

The police commissioner has no power to summarily strike from the pension roll the name of a patrolman, who had served faithfully for sixteen years and had been retired on account of disability incurred in the service, because of fraud in the issuance of his naturalization papers, of which he had no knowledge. *In re Hickey*, 56 Misc. 118, 106 N. Y. Supp. 148.

A patrolman who was under thirty years of age when his name was placed upon the eligible list for appointment to the position of patrolman does not become ineligible to appointment because he was over thirty years of age when the eligible list was established and published by the Civil Service Commission. *Sp. T., Gerard, J., People ex rel. Smith, etc.*, N. Y. Law Jour., February 7th, 1912.

Promotions in police force. (See 3d Ed., p. 208.)

§ 288. Promotions of officers and members of the police force shall be made by the police commissioner, as provided in section one hundred and twenty-four of this act, on the basis of seniority, meritorious police service and superior capacity, as shown by competitive examination, but no detail to act as inspector, or to service in the detective bureau, as hereafter provided, shall be deemed a promotion. Individual acts of personal bravery may be treated as an element of meritorious service in such examination, the relative rating therefor to be fixed by the municipal civil service commission. The police

commissioner shall transmit to the municipal civil service commission in advance of such examination the complete record of each candidate for promotion. Sergeants shall be selected from among patrolmen of the first grade, but sergeants may be reduced to the grade of patrolman at any time by the police commissioner after due trial upon charges, the determination of which may be reviewed by writ of certiorari. Lieutenants of police shall be selected from among sergeants who shall have served at least two years continuously as such. Captains shall be selected from among lieutenants of police who shall have served at least three years as such. The police commissioner shall, in the exercise of his discretion, from time to time detail nineteen captains to act as inspectors, with the title while so acting of inspectors of police, and at his pleasure may revoke any or all such details. While so detailed such officer shall receive a salary at the rate of seven hundred and fifty dollars a year in addition to the amount of salary which regularly attaches to the office of captain. When a captain shall have acted under regular detail as inspector during a period or periods aggregating five years, such officer shall have the same rights in respect to the relief pension fund as were vested by law in inspectors of police on the first day of February in the year nineteen hundred and seven; provided, however, that when the commissioner designates a captain to act in the place of a captain under regular detail as inspector, during the temporary absence or disability of the latter, the officer so designated shall not be entitled to any additional salary, and the period of such designation shall not be counted in his favor in computing such five-year period. A captain, while detailed to act as inspector, shall be chargeable with and responsible for the discipline and efficiency of the force under his command. (*As amended by L. 1907, ch. 160.*)

Promotions for meritorious or heroic conduct.

The civil service commission has the power to pass a resolution providing that, in fixing the relative ratings of candidates for promotion in the police department only such commendations and honorable mentions should be considered as should have been awarded as a result of individual acts of personal bravery; and the commission may not be compelled by mandamus to revise and re-rate the marking of a policeman in a competitive examination for promotion so as to include credit for a certain act of meritorious police service not involving personal bravery. *Morris v. Baker*, 49 Misc. 440, 99 N. Y. Supp. 957.

When a police officer has been once promoted for an heroic act, he is not again entitled to be credited with marks for the same act when he enters a competitive civil service examination to get on the eligible list for promotion

to a still higher grade. *People ex rel. Burns v. Baker*, 124 App. Div. 565, 108 N. Y. Supp. 969.

Record during period of probation.

The civil service commission in fixing the rate of a police officer upon the eligible list for promotion cannot consider his record during his period of probation and mandamus will lie to compel the commission to revise the rating of an officer where a number of points had been deducted by the commission on account of a fine imposed upon the officer during his probationary term. *People ex rel. Edwards v. Baker*, 49 Misc. 143, 97 N. Y. Supp. 453.

Assignment of patrolman to duty as detective sergeant.

See cases cited under § 290, *post*.

Promotion of patrolman from grade to grade.

A police sergeant is not entitled to take the examination for promotion to the position of lieutenant until he has served continuously for two years as a sergeant. *Sp. T., Truax, J. Matter of Murphy*, N. Y. Law Jour., December 27, 1909.

See cases cited under § 299, *post*.

Rights of officers standing highest on eligible list.

It seems that the commissioner is not required by this section of the Civil Service Law to appoint the person standing highest on the eligible list for promotion, but the commissioner has the right to select any of the persons certified to him by the civil service commission for appointment. *People ex rel. Baldwin v. McAdoo*, 110 App. Div. 432, 96 N. Y. Supp. 362.

Remedies of police officer.

Where a police officer who had been promoted to the position of inspector is subsequently returned to his former rank because the prior incumbent had been reinstated by the court which made the number of inspectors to exceed the statutory limit, his remedy, if any, to compel his recognition as an inspector, is by *quo warranto*, and not by mandamus. *People ex rel. Baldwin v. McAdoo*, 110 App. Div. 432, 96 N. Y. Supp. 362.

Police force; detective bureau. (See 3d Ed., p. 209.)

§ 290. The central office bureau of detectives heretofore existing pursuant to this section, as revised and re-enacted by chapter four hundred and sixty-six of the laws of nineteen hundred and one, and the rank or grade of detective sergeant in the police force are hereby abolished. But the persons holding the position of detective sergeant when this act takes effect shall remain members of the force with the rank of lieutenants of police and shall retain all their rights as to pay and pension or otherwise as established by law on the first day of February in the year nineteen hundred and seven, and any such per-

son whose name is on an eligible list when this act takes effect shall not be deprived of his eligibility for promotion acquired thereby. The police commissioner shall organize and maintain a bureau for detective purposes to be known as the detective bureau. The police commissioner shall, from time to time, detail to service in said bureau as many members of the force as he may deem necessary to make the bureau efficient, and may at any time revoke any such detail. Of the members of the police force so detailed the police commissioner may designate not exceeding one hundred and fifty in number as detectives of the first grade, who while performing duty in said bureau, and while so designated as detectives of the first grade, shall be paid the same salary as lieutenants of police under this chapter, but the police commissioner may at his pleasure revoke any such designation. The person who may be assigned by the police commissioner to the command of said bureau while acting in such capacity shall receive the same salary as a captain detailed to act as inspector. Any member of the force detailed to said bureau while so detailed shall retain his rank in the force and shall be eligible for promotion the same as if serving in the uniformed force, and the time during which he serves in said bureau shall count for all purposes as if served in his rank or grade in the uniformed force. The headquarters of said bureau shall be at police headquarters in the borough of Manhattan. A branch office shall be maintained in the borough of Brooklyn. Other branch offices may be maintained in such places as the commissioner may determine. (*As amended by L. 1907, ch. 160.*)

The assignment of a roundsman to the position of detective sergeant constitutes a promotion within the civil service act, and can only be permanently made as the result of a competitive civil service examination. *People ex rel. Gilhooly v. McAdoo*, 108 App. Div. 1, 95 N. Y. Supp. 400, *aff'd*, on opinion below, 185 N. Y. 537; *People ex rel. Cohen v. Bingham*, 49 Misc. 607, 99 N. Y. Supp. 1111.

§ 292. Police commissioner; duties and powers. (See 3d Ed., p. 212.)

Suspension without pay.

The provision of this section authorizing the commissioner to suspend an officer without pay pending the trial of charges against him, contemplates that such officer shall not recover pay during the period of such suspension where he has been found guilty of the charges against him. *Halpin v. City of New York*, 54 Misc. 128, 105 N. Y. Supp. 520.

The provisions of § 302, *post*, empowering the commissioner to punish officers found guilty of charges by suspension without pay and providing

that not more than thirty days' pay shall be forfeited or deducted for any offense was not intended to limit or qualify the power conferred upon the commissioner by this section to suspend an officer pending trial of charges against him. *Halpin v. City of New York*, 54 Misc. 128, 105 N. Y. Supp. 520.

Mandamus will lie to compel the police commissioner to restore to duty a member of the police force suspended without pay under this section where no written charges have been made against him. The commissioner has authority to suspend a member only where written charges have been preferred and are pending against a police officer. *People ex rel. Brennan v. Bingham*, 57 Misc. 677, 109 N. Y. Supp. 111.

Salaries of officers and members of police force. (See 3d Ed., p. 213.)

§ 299. The annual salaries and compensations of the officers and members of the police force shall be as follows, to wit: Of each captain of police who was heretofore a deputy chief of police, as provided in section two hundred and seventy-six of this act, five thousand dollars; of each captain of police who held the rank or grade of inspector of police with an annual salary of three thousand, five hundred dollars before this act took effect, three thousand, five hundred dollars; of every other captain of police, two thousand, seven hundred and fifty dollars; of each police surgeon, three thousand, five hundred dollars, and each police surgeon shall have the same rank as a captain of police detailed to act as inspector; of each lieutenant of police, two thousand dollars; of each doorman, one thousand dollars; of each sergeant, one thousand, five hundred dollars; and the grade and pay or compensation of patrolmen or policemen shall be as follows, to wit:

All such members who are patrolmen and who shall have served five years or upwards on said force, shall be members of the first grade. All such members who shall have served on such force for less than five years, and more than four years and six months, shall be members of the second grade. All such members who shall have served on such force for less than four years and six months, and more than four years, shall be members of the third grade. All such members who shall have served on such force for less than four years and more than three years, shall be members of the fourth grade. All such members who shall have served on such force for less than three years, and more than two years, shall be members of the fifth grade. All such members who shall have served on such force for less than two years, and more than one year, shall be members of the sixth grade. And all persons appointed patrolmen on or after the first day of January, eighteen hundred and ninety-eight, shall be members of the

seventh grade. Whenever any member of the seventh grade shall have done service therein for one year he shall be advanced to the sixth grade. Whenever any member of the sixth grade shall have done service therein for one year, he shall be advanced to the fifth grade. Whenever any member of the fifth grade shall have done service therein for one year, he shall be advanced to the fourth grade. Whenever any member of the fourth grade shall have done service therein for one year, he shall be advanced to the third grade. Whenever any member of the third grade shall have done service therein for six months, he shall be advanced to the second grade. And any member of said force who shall have served six months in the second grade, shall become a member of the first grade. But no such patrolman shall be so advanced as aforesaid, except after an examination and approval by the police commissioner of his record, efficiency and conduct. The annual pay or compensation of the members of the police force who are patrolmen as aforesaid, shall be as follows: For members of the first grade, at the rate of not less than one thousand four hundred dollars each; for members of the second grade, at the rate of not less than one thousand three hundred and fifty dollars each; for members of the third grade, at the rate of not less than one thousand two hundred and fifty dollars each; for members of the fourth grade, at the rate of not less than one thousand one hundred and fifty dollars each; for members of the fifth grade, at the rate of not less than one thousand dollars each; for members of the sixth grade, at the rate of not less than nine hundred dollars each; for members of the seventh grade, at the rate of not less than eight hundred dollars each. The pay or compensation aforesaid shall be paid monthly to each person entitled thereto, subject to such deductions for or on account of lost time, sickness, disability, absence, fines or forfeitures, as the police department may by rules and regulations, from time to time prescribe or adopt. Nothing in this section contained shall be construed to change in any way the salaries or grading, present or prospective, of the patrolmen or policemen, who are or became members of the New York police force, prior to January first, eighteen hundred and ninety-eight. All other patrolmen or policemen of the various police forces consolidated into a single force by the provisions of this act, shall belong, so far as pay or compensation is concerned, to the grade indicated by the pay or compensation which they are respectively receiving on January first, eighteen hundred and ninety-eight. But nothing in this section contained shall be construed to affect in any other way the rights and privileges secured under the provisions of this act to the members of the various police forces consolidated into a single force by this act. The date for

the eligibility of any member of the forces transferred to the consolidated force by sections two hundred and seventy-seven, two hundred and seventy-eight, two hundred and seventy-nine, and two hundred and eighty of this act for advancement to the next grade, shall be the day of the year on which he was originally appointed to the force from which he was transferred; and any member of the forces so transferred not a member of the New York police force prior to January first, eighteen hundred and ninety-eight, whose salary falls between two grades, shall receive the salary of and be assigned to the grade next above the salary he is receiving at the time of transfer.

Salaries of all officers in the forces so transferred other than officers in the New York police prior to January first, eighteen hundred and ninety-eight, shall be equalized on the same basis. If the difference in pay is not more than fifty dollars the pay shall be equalized at once. If the difference is more than fifty dollars, the pay shall be made uniform within three years by equal annual additions. (*As amended by L. 1907, ch. 160.*)

Promotion from grade to grade.

A patrolman is not entitled to promotion from the lowest grade to the next higher grade on the force until one year after the completion of his probationary term. The period of probation cannot be included in computing the one-year service necessary for such promotion. *People ex rel. Archer v. McAdoo*, 110 App. Div. 740, 96 N. Y. Supp. 445, *aff'd*, on opinion below, 184 N. Y. 575.

§ 300. Police commissioner; rules, etc., for government and discipline of police department and police force; trials; dismissals. (See 3d Ed., p. 216.)

Notice of charges.

A member of the police force is entitled to forty-eight hours' notice of hearing by Rule 36g of the department and he will be reinstated upon certiorari, where he has been removed after trial had upon a shorter notice of hearing. *People ex rel. Clancy v. Bingham*, 123 App. Div. 226, 107 N. Y. Supp. 1063; *People ex rel. McCarthy v. Bingham*, 135 App. Div. 351, 120 N. Y. Supp. 395.

While the provisions of Rule 369 of the police department prescribe that shorter notice of charges than forty-eight hours may be given to a member of the police force, where witnesses reside out of the State or are remote from the place of trial, only such evidence should be received upon the hearing and it is a fatal violation of the rights of the accused, to continue the hearing by receiving the testimony of resident witnesses, without showing

the necessity thereof, and the error is not cured by granting the accused an adjournment and an opportunity to present his evidence. *People ex rel. McCarthy v. Bingham*, 135 App. Div. 351, 120 N. Y. Supp. 395.

Procedure on hearing of charges.

A deputy commissioner is not disqualified from presiding upon the trial of a patrolman by reason of the fact that he had directed the police captain to prefer the charges against the patrolman particularly where it appears that under the rules of the department it was the duty of the captain to prefer the charges without any direction from the deputy commissioner. *People ex rel. Brown v. Greene*, 106 App. Div. 230, 94 N. Y. Supp. 477, *aff'd*, without opinion, 184 N. Y. 565.

Any error, involved in the refusal of the deputy commissioner to grant the accused patrolman's request for an adjournment of the trial, made on the ground that his counsel could not be present and that his witnesses were not in attendance, is cured, where, after the examination of three witnesses the deputy commissioner grants an adjournment and on the adjourned day produces for cross-examination the witness previously sworn. *People ex rel. Brown v. Greene*, 106 App. Div. 230, 94 N. Y. Supp. 477, *aff'd*, without opinion, 184 N. Y. 565.

A member of the police force is entitled to the benefit of counsel upon the trial of charges against him. *People ex rel. O'Neil v. Bingham*, 132 App. Div. 667, 117 N. Y. Supp. 429.

No provision of law requires the people of the city to furnish counsel to a member of the police force against whom charges are presented. It is optional with himself whether or not he shall have counsel. *People ex rel. O'Neil v. Bingham*, 132 App. Div. 667, 117 N. Y. Supp. 429.

When an officer is represented by counsel he is not entitled to reinstatement merely because his counsel by reason of illness, failed to appear on the day to which the trial was adjourned, if knowing the facts the officer made no application for an adjournment until the time of the hearing at which witnesses from out of town were present to testify, and neither offered to testify that he had a meritorious defense nor presented an affidavit of merits. *People ex rel. O'Neil v. Bingham*, 132 App. Div. 667, 117 N. Y. Supp. 429.

Where several charges against a police officer are being tried together and a witness who had been sworn and had testified upon one of the charges is inadvertently permitted by the deputy commissioner to testify without being sworn upon one of the other charges, *held*, not to invalidate the proceeding where the officer on trial made no objection to the reception of such testimony but acquiesced in the tacit assumption of the deputy commissioner that the oath already taken by the witness upon one of the charges qualified him to testify upon another charge in regard to which he had not specially been sworn. *People ex rel. Niebuhr v. McAdoo*, 184 N. Y. 304, *aff'g* 107 App. Div. 615, 95 N. Y. Supp. 1153.

In proceedings before the commissioner, strict rulings upon evidence are not required. *People ex rel. Walters v. Lewis*, 111 App. Div. 375, 97 N. Y. Supp. 1057, *aff'd* 186 N. Y. 583.

It is not error to compel a police officer to testify on cross-examination that he had been tried several times and found guilty on similar charges. *People ex rel. Walters v. Lewis*, 111 App. Div. 375, 97 N. Y. Supp. 1057, *aff'd* 186 N. Y. 583.

On the trial of a police officer for neglect of duty, statements made in the private office of the police commissioner in the absence of the relator are inadmissible. *People ex rel. Tighe v. McAdoo*, 121 App. Div. 178, 105 N. Y. Supp. 599.

The police commissioner is without power to remove a police officer upon the report of a deputy that he has found the officer guilty unless he has before him the evidence given upon the hearing held by the deputy. *People ex rel. Syperrek v. McAdoo*, 125 App. Div. 673, 110 N. Y. Supp. 140.

Where a police officer had been tried upon a number of charges and the deputy commissioner presiding at the trial found the officer guilty of two of the charges and recommended his dismissal, and the findings and recommendation had been approved by the commissioner, *held*, that the entry by a clerk of the department of a final order dismissing the officer upon all of the charges did not invalidate the proceeding and that the court had power to modify the final order so that it would conform to the findings of the deputy commissioner as approved by the commissioner. *People ex rel. Reagan v. Partridge*, 184 N. Y. 566, *mod'g* 103 App. Div. 609, 93 N. Y. Supp. 1143.

Where charges have been preferred against a police officer for neglect of duty, and on his failure to appear at the hearing, at which no evidence was taken, charges are again made, founded upon the failure to appear on the former charge, which latter charge he seeks to excuse before the deputy commissioner on the ground of illness. *Held*, that the commissioner upon disapproving a sentence of forfeiture of pay, recommended by the deputy as a punishment for the latter charge, cannot dismiss the officer upon the prior charges, for as to these there has been no hearing or investigation. *People ex rel. Connolly v. Bingham*, 124 App. Div. 170, 108 N. Y. Supp. 684.

A police commissioner has no power to review the action of his predecessor dismissing a member from the police force. *People ex rel. Padian v. McAdoo*, 114 App. Div. 100, 99 N. Y. Supp. 600.

The action of a police commissioner in dismissing an officer is invalid if based upon proceedings had before his predecessor and not resulting in a final judgment. *Matter of Elder v. Bingham*, 118 App. Div. 25, 103 N. Y. Supp. 617, *aff'd* 189 N. Y. 509.

Insanity of police officers.

The provisions of this section, empowering the police commissioner to dismiss any member of the police force who may have become insane or of unsound mind so as to be unable or unfit to perform full police duty, does not authorize the removal of a member of the force for a mere temporary aberration of mind or delirium which may be a symptom of, or the accompaniment of, some acute form of disease. The statute has in contemplation a permanent condition of insanity or mental unsoundness such as will render the member of the force unable or unfit to perform police duty. *Reiblich v. Cropsey*, 71 Misc. 502, 130 N. Y. Supp. 597.

A member of the police force who has been summarily removed without charges or a hearing on the ground of insanity is entitled to the issuance of a writ of mandamus to review the action of the commissioner and the fact that the relator some months prior to his dismissal had been adjudged insane on an *ex parte* application and at the time of his dismissal he was still incarcerated in a State asylum, is no ground for the denial of the writ since such adjudication of insanity would only be *prima facie* evidence of mental unsoundness which could be overcome by proof of his actual mental soundness and fitness for duty on the date of his dismissal from the force. *Reiblich v. Cropsey*, 71 Misc. 502, 130 N. Y. Supp. 597.

Cause of removal; legal offenses.

The commission of a crime by a police officer and his conviction thereof does not operate *ipso facto* as a forfeiture of his position in the department. The provisions of § 302, *post*, provide that the police commissioner shall have power in his discretion on conviction by him or by any court or officer of competent jurisdiction to punish the offender in various ways, including dismissal from the force. *People ex rel. Cunningham v. Bingham*, 134 App. Div. 602, 119 N. Y. Supp. 417.

Although a police officer has been acquitted upon the trial of an indictment for bribery, he may be tried by the police commissioner for the same act and dismissed for neglect of duty or conduct unbecoming an officer. The former acquittal is not conclusive upon the police commissioner so as to support a claim that the officer is twice put in jeopardy for the same offense. *People ex rel. Cunningham v. Bingham*, 134 App. Div. 602, 119 N. Y. Supp. 417.

When a member of the police force was put upon trial by the police commissioner for accepting a bribe, *held*, that the rule of reasonable doubt applicable to criminal cases did not apply, that it was sufficient if the charge was sustained by the preponderance of evidence. *People ex rel. Cunningham v. Bingham*, 134 App. Div. 602, 119 N. Y. Supp. 417.

Conduct unbecoming an officer.

The commissioner within reasonable limits has the power to determine what acts constitute conduct unbecoming an officer and the courts will not

interfere with his judgment in this respect, further than to see that the conduct proven fairly warranted the exercise of this judgment. *People ex rel. Berlin v. Bingham*, 124 App. Div. 553, 108 N. Y. Supp. 933.

The removal of a police officer for a mere technical violation of a rule of the department which is not shown to have prejudiced the rights of the public or interfered with the proper discipline of the department, will not be sustained. *People ex rel. Brennan v. Bingham*, 130 App. Div. 710, 115 N. Y. Supp. 639; *People ex rel. Gannon v. McAdoo*, 117 App. Div. 438, 102 N. Y. Supp. 656.

An unconscious and involuntary violation of the rules of the department by a police officer furnishes no ground for his dismissal. *People ex rel. Tighe v. McAdoo*, 121 App. Div. 178, 105 N. Y. Supp. 599.

The omission of a police officer to state that he is a patrolman when reporting to headquarters in respect to a crime, *held* no ground for dismissal, there being no rule of the department requiring him to make such statement. *People ex rel. Gannon v. McAdoo*, 117 App. Div. 438, 102 N. Y. Supp. 656.

Where a member of the police force who had been attached for some years to the boiler squad wrote a letter to a board of steam engineers of which he was a member, containing a statement why he had been transferred to patrol duty, *held* that he was not guilty of insubordination warranting his dismissal from the force where the letter contains nothing that can be fairly construed as insubordination and it is not claimed that any of the facts stated in the letter are false or falsely colored or that the officer was actuated by malice or an intention to cast reproach upon the department or his superior officers. *People ex rel. Sesselman v. Bingham*, 189 N. Y. 104, rev'g 118 App. Div. 906, 103 N. Y. Supp. 1138.

The fact that a policeman did not report the loss of a pocketbook by a person of which he did not know until after the prisoner's discharge; and on subsequent finding the pocketbook, kept it for the owner at his request, and denied to the police captain that it contained pawn tickets, does not justify his dismissal, when it is undisputed that it contained no tickets when found by the officer. *People ex rel. Hackett v. Bingham*, 127 App. Div. 3, 111 N. Y. Supp. 14.

The failure of a police officer to suppress a violation of law is not excused because he acted under orders of a superior, e. g., the secretary of the commissioner, but under such circumstances the dismissal from the force of an experienced officer with an excellent record is too severe a punishment. *People ex rel. Eggers v. Bingham*, 121 App. Div. 593, 106 N. Y. Supp. 330, *aff'd* 190 N. Y. 566.

On the trial of an officer before the police commissioner for failure to suppress disorderly houses, knowing their existence, it is error to exclude evi-

dence that he acted pursuant to a general order of the police commissioner to report the facts but not to take proceedings until ordered. *People ex rel. Eggers v. Bingham*, 121 App. Div. 593, 106 N. Y. Supp. 330, *aff'd* 190 N. Y. 566.

A member of the police force who speaks in an insolent and defiant manner to the commissioner while on trial before him is guilty of conduct unbecoming an officer, and his removal upon subsequent charges based upon such misconduct is justified. *People ex rel. Berlin v. Bingham*, 124 App. Div. 553, 108 N. Y. Supp. 933.

Removal of a member of the police force for using improper language to his superior officer, not sustained by the evidence. *People ex rel. McAuley v. Baker*, 139 App. Div. 148, 123 N. Y. Supp. 493.

The removal of a superintendent of telegraph and electrical service for keeping account of the electrical supplies in an insufficient manner, *held*, not sustained on the evidence. *People ex rel. Brennan v. Bingham*, 130 App. Div. 710, 115 N. Y. Supp. 639.

The removal of a superintendent of telegraph and electrical service in the police department for failure to keep accurate diagrams of the location of cables, wires and connections with reference to police lines, *held* unjustifiable. *People ex rel. Brennan v. Bingham*, 130 App. Div. 710, 115 N. Y. Supp. 639.

The removal of a superintendent of telegraph and electrical service for purchasing on one occasion a mile of telephone wire instead of making a requisition for it upon the bureau of supplies, where the same was purchased to meet an emergency, *held* distinguishable. *People ex rel. Brennan v. Bingham*, 130 App. Div. 710, 115 N. Y. Supp. 639.

The removal of a police captain for failure to comply with the rule of a police department requiring him to make frequent visits to portions of his precinct at uncertain hours in order to insure the proper performance of police duty, sustained. *People ex rel. Stephenson v. Bingham*, 132 App. Div. 345, 116 N. Y. Supp. 1041.

The removal of a lieutenant of police for absence from desk duty not sustained upon the evidence. *People ex rel. Kenny v. Bingham*, 127 App. Div. 49, 111 N. Y. Supp. 92.

Removal of police officer for absence from his post sustained. *People ex rel. Rooney v. Bingham*, 129 App. Div. 578, 114 N. Y. Supp. 110, *aff'd* 195 N. Y. 609.

Removal of police officer for absence from his post not sustained. *People ex rel. McAuley v. Baker*, 139 App. Div. 148, 123 N. Y. Supp. 493; *People ex rel. Gannon v. McAdoo*, 117 App. Div. 438, 102 N. Y. Supp. 656.

The failure of a member of the police force to enter his absence from duty

on the books at the station house, *held* excusable under the circumstances of the case. *People ex rel. Gannon v. McAdoo*, 117 App. Div. 438, 102 N. Y. Supp. 656.

Dismissal of a police officer on a charge that he improperly represented himself to the ticket chopper of a subway station as a detective sergeant, entitled to free transportation as a passenger, *held* not sustained by the evidence. *People ex rel. Trayer v. Bingham*, 126 App. Div. 350, 110 N. Y. Supp. 414.

Removal of police officer on charges of criminal assault not sustained on the evidence. *People ex rel. McCarthy v. Baker*, 143 App. Div. 107, 127 N. Y. Supp. 565.

Dismissal of a police officer for accepting money in violation of Rule 22 of the police manual, *held*, not to be sustained by the evidence. *People ex rel. Maguire v. Bingham*, 117 App. Div. 192, 102 N. Y. Supp. 347.

Dismissal of a police officer for accepting a bribe of a person guilty of a violation of the Liquor Tax Law sustained upon the evidence. *People ex rel. Cunningham v. Bingham*, 134 App. Div. 602, 119 N. Y. Supp. 417.

The removal of a police officer for unlawfully arresting persons and falsely charging them with assault, *held*, not sustained on the evidence. *People ex rel. Gebhard v. Baker*, 144 App. Div. 450, 129 N. Y. Supp. 349.

Removal of a police officer for arresting and striking a citizen without cause, not sustained. *People ex rel. Devon v. Baker*, 141 App. Div. 888, 126 N. Y. Supp. 885.

To same effect: *People ex rel. Kelly v. Baker*, 142 App. Div. 66, 126 N. Y. Supp. 675.

The removal of a police officer on the charge of assaulting a fellow officer not sustained on the evidence. *People ex rel. Clinton v. Bingham*, 123 App. Div. 286, 107 N. Y. Supp. 1055.

The removal of a police officer charged with interfering with the performance of duty by another officer, *held* not sustained by the evidence. *People ex rel. Byrne v. Baker*, 140 App. Div. 137, 124 N. Y. Supp. 1056.

Removal of officers for offenses while off duty.

The fact that a member of the police force while off duty took a few glasses of beer which did not in any way disqualify him from taking care of himself, *held* not to justify his dismissal upon a charge of intoxication. *People ex rel. Byrne v. Baker*, 140 App. Div. 137, 124 N. Y. Supp. 1056.

Review of removals by certiorari.

Mandamus will lie to compel the reinstatement of a member of the police force who had been dismissed upon charges but procured a rehearing upon the

same charges at which he was exonerated. *Sp. T., Ford, J., People ex rel Hannan v. Waldo*, as Comm'r. of the City of New York, N. Y. Law Jour., December 22nd, 1911.

Mandamus will not lie to compel the reinstatement of a police officer who has been removed from the force after a trial upon charges. Certiorari is the appropriate remedy in such a case to review the action of the commissioner. *People ex rel. Hanrahan v. McAdoo*, 110 App. Div. 894, 96 N. Y. Supp. 1069.

The court has no power to review the discretion of the commissioner as to the extent of punishment imposed. *People ex rel. Van Bargaen v. Bingham*, 134 App. Div. 919, 118 N. Y. Supp. 880; *People ex rel. Berlin v. Bingham*, 124 App. Div. 553, 108 N. Y. Supp. 933.

The good of the service requires that a wide discretion should be vested in the police commissioner and his judgment and determination in a given case, where the evidence is conflicting and contradictory, should be regarded as conclusive. *People ex rel. Brown v. Greene*, 106 App. Div. 230, 94 N. Y. Supp. 477, aff'd, without opinion, 184 N. Y. 565.

The judgment of the commissioner removing a police officer will be reversed where the evidence is so clearly in his favor, that the verdict of a jury in an action in the Supreme Court upon the same facts would have been set aside as against the weight of evidence. *People ex rel. Cunningham v. Bingham*, 134 App. Div. 602, 119 N. Y. Supp. 417; *People ex rel. Gebhard v. Baker*, 144 App. Div. 450, 129 N. Y. Supp. 349; *People ex rel. Kelly v. Baker*, 142 App. Div. 66, 126 N. Y. Supp. 675.

While the record of a police officer cannot be considered in determining whether he is guilty of the charges preferred against him, it may be considered by the commissioner in fixing the punishment to be imposed after conviction upon the charge. Accordingly, the fact that a police officer was compelled to disclose upon the trial that he had been convicted and punished several times upon similar charges within a short period, did not constitute reversible error when the commissioner certified that the relator's removal was based upon his last dereliction and not upon his past record. *People ex rel. Walters v. Lewis*, 111 App. Div. 375, 97 N. Y. Supp. 1057, aff'd 186 N. Y. 583.

A recital in the return of a writ of certiorari that the deputy commissioner presiding at the trial of the officer "had been duly designated to hear the evidence upon the said charges" is binding upon the relator and establishes *prima facie* the jurisdiction of the deputy commissioner to conduct the trial. *People ex rel. Cummings v. Greene*, 112 App. Div. 883, 97 N. Y. Supp. 748.

Where a writ of certiorari to review the removal of a police officer, directs the police commissioner to make a return of all proceedings in any way or manner relating to the dismissal of the relator, it leaves no discretion to

determine what proceedings are necessary, for a review of his action, but requires that a full and complete return shall be made. *People ex rel. Parker v. Bingham*, 57 Misc. 28, 106 N. Y. Supp. 1079.

Where the return to a writ of certiorari to review the removal of a police officer is insufficient because it does not comply with the writ the commissioner will be compelled to make the further return. *People ex rel. Parker v. Bingham*, 57 Misc. 28, 106 N. Y. Supp. 1079; *People ex rel. Moynihan v. McAdoo*, 112 App. Div. 32, 98 N. Y. Supp. 40.

A police officer is not entitled to a further return of papers not used upon his trial although such papers had been used upon a former trial. *People ex rel. Moynihan v. McAdoo*, 112 App. Div. 32, 98 N. Y. Supp. 40.

Affidavits upon a motion by the police commissioner to vacate an order reinstating a member of the police force and to cancel the return to the original writ of certiorari with permission to file an amended return, and for a reargument on the ground that the original return was false and untrue, examined and *held*, that the motion should be denied. *People ex rel. Ringelman v. Bingham*, 133 App. Div. 241, 117 N. Y. Supp. 363.

The relator on a writ of mandamus to compel his reinstatement to the police force, has a right to discontinue the proceeding but the order of discontinuance should not contain the recital "without prejudice to a new proceeding." The right to such new proceeding must be determined upon the papers presented therein. *People ex rel. Morgan v. Bingham*, 115 App. Div. 474, 101 N. Y. Supp. 410.

Costs.

The police commissioner has no power to grant or to withhold costs of any trial had before him. *People ex rel. Shields v. Greene*, 114 App. Div. 168, 99 N. Y. Supp. 679.

Salary upon reinstatement.

A police officer cannot recover from the city upon reinstatement salary of the position during the period of removal, where the salary during such interval has been paid to another regularly appointed to his place who performed the duties of the position. *Grant v. City of New York*, 111 App. Div. 160, 97 N. Y. Supp. 685.

§ 302. Police commissioner; punishments by; limitations of suits for reinstatements, etc. (See 3d Ed., p. 227.)

Punishment.

The provisions of this section empowering the commissioner to punish officers found guilty of charges by suspension without pay and providing that not more than thirty days' pay shall be forfeited or deducted for any offense, was not intended to limit or qualify the power conferred upon the commissioner under § 292, *ante*, to suspend an officer pending trial of charges

against him. *Halpin v. City of New York*, 54 Misc. 128, 105 N. Y. Supp. 520.

See cases under § 300, *ante*.

Four months' limitation.

The objection that a proceeding by mandamus to reinstate a patrolman is barred by the four months' statute of limitation must be taken either by the return to the writ or by demurrer, and if not thus taken it is waived. The writ cannot be dismissed upon motion, because the right to the relief asked is barred by the statute of limitations prescribed in this section. *People ex rel. Ryan v. Bingham*, 114 App. Div. 170, 99 N. Y. Supp. 593.

Where a petition for a writ of certiorari to review a removal by the police commissioner was presented to the court within four months from the date of the removal but the writ was not served until after the expiration of that period, *held* that the proceeding was barred by the four months' statute of limitations prescribed by this section. The proceeding is instituted when the petition for the writ is presented to the court irrespective of the date of service of the writ. *People ex rel. Syperreck v. McAdoo*, 125 App. Div. 673, 110 N. Y. Supp. 140.

The question whether a police officer has been guilty of laches in seeking restoration to the force is one of fact and the Court of Appeals has no jurisdiction to review a unanimous decision of the Appellate Division, holding a relator not guilty of laches. *People ex rel. Hurlbut v. Bingham*, 186 N. Y. 538, *aff'g* 113 App. Div. 921, 100 N. Y. Supp. 1136.

The commission of a crime by a police officer and his conviction thereof, does not operate *ipso facto* as a forfeiture of his position in the department. The provisions of this section merely provide that the police commissioner shall have power in his discretion on conviction by him or by any court or officer of competent jurisdiction, to punish the offender in various ways, including dismissal from the force. *People ex rel. Cunningham v. Bingham*, 134 App. Div. 602, 119 N. Y. Supp. 417.

The four months' statute of limitation provided by this section within which proceedings for the reinstatement of police officers dismissed from the force must be instituted, has no application to a proceeding brought to compel the restoration to active duty of a police officer unlawfully retired on a pension. *People ex rel. Hurlbut v. Bingham*, 186 N. Y. 538, *aff'g* 113 App. Div. 921, 100 N. Y. Supp. 1136; *People ex rel. Tims v. Bingham*, S. T., Part 1, Clinch, J., N. Y. Law Jour., April 5, 1906, at page 57.

§ 303. Police force; resignation and absences on leave. (See 3d Ed., p. 229.)

Absence without leave.

The police commissioner has no power to review the action of his pred-

ecessor in dismissing a patrolman under this section, for absence for five days without leave. *People ex rel. Padian v. McAdoo*, 114 App. Div. 100, 99 N. Y. Supp. 600.

The action of a police commissioner in dismissing an officer is invalid if based upon proceedings had before his predecessor, and not resulting in a final judgment. *Matter of Elder v. Bingham*, 118 App. Div. 25, 103 N. Y. Supp. 617, aff'd 189 N. Y. 509.

Absence of a police officer from duty when caused by act of God or illness, furnishes no ground for his dismissal under this section. *Matter of Elder v. Bingham*, 118 App. Div. 25, 103 N. Y. Supp. 617, aff'd 189 N. Y. 509.

Certiorari will not lie to review the action of the police commissioner in dismissing a patrolman for absence for five days, without notice, or a hearing. The statute authorizes the dismissal of a police officer for absence without a hearing. *People ex rel. Padian v. McAdoo*, 114 App. Div. 100, 99 N. Y. Supp. 600.

Mandamus is the appropriate remedy to review the action of the police commissioner in dismissing a police officer for absence from duty for five days without leave. *Matter of Elder v. Bingham*, 118 App. Div. 25, 103 N. Y. Supp. 617, aff'd 189 N. Y. 509.

§ 306. Police force; gratuities and political contributions forbidden. (See 3d Ed., p. 230.)

Members of a political club.

The provision of this section prohibiting persons in the police force from joining or becoming members of a political club or association is applicable to the office of first deputy police commissioner. *McAvoy v. Press Pub. Co.*, 114 App. Div. 540, 99 N. Y. Supp. 1041.

This section not only prohibits members of the police force from joining or becoming members of a political club or association subsequent to their appointment to the force, but likewise prohibits members of the police force from remaining members of a political club or association to which they belonged prior to their appointment on the police force. *McAvoy v. Press Pub. Co.*, 114 App. Div. 540, 99 N. Y. Supp. 1041.

§ 308. Special patrolman; when may be appointed. (See 3d Ed., p. 231.)

Liability for arrests by special patrolman.

It is the duty of a special patrolman under this section to arrest without a warrant a person committing an offense in his presence. *Schultz v. Greenwood Cemetery*, 190 N. Y. 276, rev'g 112 App. Div. 922, 98 N. Y. Supp. 1114.

A storekeeper upon whose application a special patrolman is appointed and assigned to duty on his premises, *held*, not responsible for a false arrest made by such patrolman, where neither the storekeeper or his employees instigated or took any part in the arrest. *Tyson v. Bauland Co.*, 186 N. Y. 397, rev'g 106 App. Div. 612, 95 N. Y. Supp. 1164.

To same effect see *Pennsylvania R. Co. v. Kelly*, 77 Fed. Rep. 189.

§ 315. Police department; duty of. (See 3d Ed., p. 235.)

Liability of city for acts of police officers.

The police officers of a municipal corporation are not to be deemed its servants or agents, in such a sense as to render it responsible for the damages occasioned to third persons by a failure on their part to duly and properly discharge the duties imposed upon them. *Gaetjens v. City of New York*, 132 App. Div. 394, 116 N. Y. Supp. 759; *Wilcox v. City of Rochester*, 190 N. Y. 137, rev'g 114 App. Div. 734, 99 N. Y. Supp. 1020.

Regulation of traffic.

Prior to the amendment of this section, authorizing the police commissioner "to make rules and regulations for the conduct of vehicle traffic in the use of the public streets, squares and avenues as he may deem necessary," it was held that a police commissioner had no power to totally prohibit the use of vehicles on parts of certain streets. *Peace v. McAdoo*, 110 App. Div. 13, 96 N. Y. Supp. 1039, aff'g 46 Misc. 295, 92 N. Y. Supp. 368.

A regulation adopted by the police commissioner under this section prescribing the side of the street to be used by vehicles moving in a given direction, is not applicable to the officers and employees of the fire department when engaged in the performance of duties requiring the exercise of haste for the public safety. *People v. Mahoney*, 65 Misc. 449, 121 N. Y. Supp. 898.

The rules adopted by the police department for the regulation of traffic in the streets of the city have no application to the officers and employees of the fire department whilst in the performance of their duties. *People v. Mahoney*, 65 Misc. 449, 121 N. Y. Supp. 898.

Arrests without a warrant.

It is the duty of a police officer to arrest without warrant for a crime committed or attempted in his presence. *Schultz v. Greenwood Cemetery*, 190 N. Y. 276, rev'g 112 App. Div. 922, 98 N. Y. Supp. 1114.

A policeman has no authority to arrest, without a warrant, a person violating a city ordinance, unless expressly authorized so to do by the city charter, or unless such violation of the ordinance is accompanied by a breach of the peace. *Clayman v. City of New York*, 117 App. Div. 565, 102 N. Y. Supp. 661.

A police officer is not justified either by common law or by statute in making an arrest without warrant, merely because the person arrested was acting "in a suspicious manner." *Philips v. Leary*, 114 App. Div. 871, 100 N. Y. Supp. 200.

The fact that an unauthorized arrest is made by a police officer upon the instigation of a member of the street cleaning department, for an alleged violation of the ordinance, prohibiting the throwing of refuse into the streets, *held*, not to make the city liable therefor. *Clayman v. City of New York*, 117 App. Div. 565, 102 N. Y. Supp. 661.

Inspection of premises.

It is the duty of the police under this section, to enter and inspect premises where it is suspected that gambling is being committed, in order to prevent the commission of crime. *People ex rel. Fried v. Frank*, 73 Misc. 1, 130 N. Y. Supp. 807.

Restraining trespasses by police.

A suit in equity will not lie to restrain police officers from stationing patrolmen in front of premises where the occupant is suspected of conducting a poolroom in violation of law. It seems that the remedy, if any, is under § 556 of the Penal Code, or by an action at law for damages. *Stevens v. McAdoo*, 112 App. Div. 458, 98 N. Y. Supp. 553.

Although a court of equity will not restrain police officers from enforcing the criminal law, or from watching the premises of one suspected of crime, yet, such court has jurisdiction to restrain police officers from committing wanton trespass without a semblance of right, and when it appears that there is no real question of the commission of a crime. *McGorie v. McAdoo*, 113 App. Div. 271, 99 N. Y. Supp. 47; *Hagan v. McAdoo*, 113 App. Div. 506, 99 N. Y. Supp. 255; *Devlin v. McAdoo*, 49 Misc. 57, 96 N. Y. Supp. 425.

Instances in which it has been held that a court of equity would enjoin the police from trespassing upon premises: *Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81; *Hale v. Burns*, 101 App. Div. 101, 91 N. Y. Supp. 929; *McGorie v. McAdoo*, 113 App. Div. 271, 99 N. Y. Supp. 47; *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51; *Levy v. Bingham*, 113 App. Div. 424, 99 N. Y. Supp. 258; *Hagan v. McAdoo*, 113 App. Div. 506, 99 N. Y. Supp. 258; *Olms v. Bingham*, 116 App. Div. 804, 101 N. Y. Supp. 1106; *Phelps v. McAdoo*, 47 Misc. 524, 94 N. Y. Supp. 265; *Fairmont Athletic Club v. Bingham*, 61 Misc. 419, 113 N. Y. Supp. 905.

Instances in which it was held that the courts would not enjoin the police from making arrests for alleged violation of law or from watching or entering premises suspected of harboring or maintaining unlawful acts or business: *Cleary v. McAdoo*, 113 App. Div. 178, 99 N. Y. Supp. 60; *Eden Musee, etc. v. Bingham*, 125 App. Div. 780, 110 N. Y. Supp. 210; *Suesskind v. Bingham*,

125 App. Div. 787, 110 N. Y. Supp. 213; Olympic Athletic Club *v.* Bingham, 125 App. Div. 793, 110 N. Y. Supp. 216; Shepard *v.* Bingham, 125 App. Div. 784, 110 N. Y. Supp. 217; Red Raven Social Club *v.* Bingham, 62 Misc. 401, 116 N. Y. Supp. 709; Colby *v.* Bingham, 62 Misc. 396, 116 N. Y. Supp. 115.

Where a temporary injunction restraining the police officers from trespassing upon private premises has been made a means of securing protection for criminal acts upon such premises, *held* that the injunction will be vacated. Devlin *v.* McAdoo, 116 App. Div. 224, 101 N. Y. Supp. 546.

Police officers; general powers over certain trades. (See 3d Ed., p. 238.)

§ 316. The police commissioner and each of his deputies and each captain of police detailed to act as inspector in his district, and each captain of police within his precinct shall possess powers of general police supervision and inspection over all licensed or unlicensed pawnbrokers, venders, junkshop keepers, junk-boatmen, cartmen, dealers in second-hand merchandise, intelligence-office keepers, and auctioneers, within the said city; and in the exercise of said supervision, may from time to time empower members of the police force to fulfill such special duties in the aforesaid premises as may be from time to time ordained by the police commissioner. The said police commissioner and each of his deputies and each captain of police detailed to act as inspector in his district and each captain within his precinct may, by authority in writing, empower any member of the police force, whenever such member shall be in search of property feloniously obtained, or in search of suspected offenders, or evidence to convict any person charged with crime to examine the books of any pawnbroker, or his business premises, or the business premises of any licensed vender, or licensed junkshop keeper, or dealer in second-hand merchandise, or intelligence-office keeper, or auctioneer, or boat of any junk-boatman, and to examine property alleged to be pawned, pledged, deposited, lost or stolen, in whosoever* possession said property may be; but no such property shall be taken from the possessor thereof without due process or authority of law. (*As amended by L. 1907, ch. 160.*)

§ 317. Police department may examine pawnbrokers' books. (See 3d Ed., p. 239.)

The police commissioner is vested by this section with general supervision over pawnbrokers. People *v.* Rosenberg, 59 Misc. 342, 112 N. Y. Supp. 316.

*So in original.

§ 320. Police commissioner to furnish station houses, etc.
(See 3d Ed., p. 240.)

The police department in providing and maintaining station houses, performs a public and governmental, as distinguished from a municipal duty, and therefore the city is not liable for the negligence of its officers, servants or agents in the care or management of such building. So *held*, holding that the city was not liable for injuries sustained to a mechanic on his way to repair the roof of a station house caused by the alleged negligence of a police telegraph operator in leaving open the door of an elevator shaft when the elevator had been moved up and away from the door so that the mechanic believing that the elevator was still there stepped through the door and fell to the bottom of the shaft. *Wilcox v. City of Rochester*, 190 N. Y. 137.

§ 337. Police force; arrests without a warrant. (See 3d Ed., p. 245.)

It seems that the provisions of the charter of the city of New York, giving police officers "all the common-law and statutory powers of constables," gives them only the existing statutory powers, for the charter refers to the common law as codified and expressed by statute. *Philips v. Leary*, 114 App. Div. 871, 100 N. Y. Supp. 200. See also cases cited under § 315, *ante*.

§ 343. Steam boilers; no person to use, or act as engineer for, without certificate. (See 3d Ed., p. 249.)

Certiorari does not lie to review the determination of the police commissioner in revoking the license of an engineer after a trial upon charges, as the granting or revocation of a license under this section is an administrative, and not a judicial act. *People ex rel. Keating v. Bingham*, 138 App. Div. 736, 123 N. Y. Supp. 506.

Police department; licenses to steamer and railroad runners.

* § 349. The police board may issue licenses authorizing the person or persons to whom the same are issued, upon any street, public highway, dock or pier, or in any part or square in the city of New York, or upon any water adjacent thereto, over which said city has jurisdiction, to solicit patronage for any hotel, or inn, or passengers or patronage, for any steamer, steamboat, ship, vessel or railroad, or for any person or corporation selling or offering for

* This section is reprinted for the reason that a part of it was omitted in the third edition of this work.

sale passage tickets, or contracting or offering to contract for passage in any such steamer, steamboat, ship, vessel or railroad. Such license shall be for the period of one year from the date thereof, and every person receiving such a license shall pay the sum of twenty dollars therefor to the police board, and shall also give to said board a bond, with two good and sufficient sureties in the penalty of three hundred dollars, conditioned for his good behavior, and the faithful observance by him of the provisions of this section. It shall be lawful for said board, upon an application made prior to the expiration of said license to renew and continue the same from year to year, provided that the applicant therefor continues in all respects qualified, as herein provided, to hold such license, and the said applicant shall, upon receiving such renewal, pay into the city treasury the further sum of twelve dollars and fifty cents per annum as a renewal fee. Licenses and renewals may be revoked at any time by the said board for any cause satisfactory to it, such cause to be stated in writing to the person so removed at the time of the notice of his removal. No person shall receive any license under the provisions of this section who is not a citizen of the United States and a person of good general character, such fact to be proved to the satisfaction of the police board. Said board shall render to the comptroller of said city quarterly accounts of all moneys received by it under the provisions of this section, and the amount so received shall be paid over by said board into the city treasury.

Police commissioner; power to retire and grant pensions to officers of force. (See 3d Ed., p. 258.)

§ 354. The police commissioner shall have power, in his discretion, to retire and dismiss from membership in the said police force, and thereupon to grant pensions to, as hereinafter provided, any member of the police force of said city who shall have become disabled, physically or mentally, or superannuated by age so as to be unfit for police duty, and to dependent parents, widows, and orphans of such members to be paid from the police pension fund as follows:

1. To the dependent parent or parents, or widow of any member of the police force within the limits of said city, who shall have been killed while in the actual performance of duty, or shall have died from the effects of any injury received whilst in the actual discharge of such duty the sum of not more than six hundred dollars per annum and to the widow of any member of such force who has died, or who shall hereafter die after ten years of service in the police force within the limits of The City of New York, as constituted by this act, or who

shall have been retired upon a pension, if there be no child or children under eighteen years of age of any such member, the sum of not exceeding three hundred dollars per annum, in the discretion of said commissioner; but if there be any such child or children of such member under the age aforesaid, then the said sum may be divided between such widow, child or children in such proportions and in such manner as the said trustee may direct; provided, however, that the foregoing provisions shall not be applicable to the dependent parent or widow, child or children of any member of the police force within the limits of said city who shall have been killed or died prior to the taking effect of the Greater New York charter, unless such dependent parent, or widow, child or children would have been entitled to a pension under the laws in force at that time; and provided further that in no event shall such dependent parent, or widow, child or children receive a greater pension than she, it or they would have been entitled to under the laws in force immediately prior to the taking effect of the Greater New York charter. A pension or increase of pension granted pursuant to this subdivision to the dependent parent, or widow of a member of the police force, who shall have been killed while in the actual performance of duty, or shall have died from the effects of any injury received whilst in the actual discharge of such duty, shall accrue and be paid from the date of the death of such member.

2. Subject to the like limitations, to any child or children under eighteen years of age of such member killed or dying as aforesaid, or pensioner as aforesaid, but leaving no widow, or, if a widow, then after her death to such child or children being yet under eighteen years of age, a sum not exceeding six hundred dollars per annum.

3. Subject to the like limitations, to any such member of any such police force, who, whilst in the actual performance of duty and by reason of the performance of such duty, and without fault or misconduct on his part, shall have become permanently disabled, physically or mentally so as to be unfitted to perform full police duty, a sum not exceeding one-half nor less than one-fourth of his rate of compensation per annum.

4. To any such member of the said police force who shall, after ten years and less than twenty-five years' membership in any such police force, become superannuated, by age, permanently insane or mentally incapacitated, or disabled physically or mentally, so as to be unfitted or unable to perform full police duty by reason of such disability or disease contracted without misconduct on his part, a sum not to exceed one-half nor less than one-fourth of his rate of compensation per annum. (*As amended by L. 1907, ch. 445.*)

§ 355. Police pension fund; when members of force entitled to pension; amount and duration. (See 3d Ed., p. 260.)

Superannuated by age.

The provisions of this section authorizing the police commissioner to retire a member of the police force who has become superannuated by age, so as to be unfit for duty, is not in conflict with the provisions of § 355, *post*, authorizing the police commissioner to retire upon a pension a member of the police force who has reached the age of sixty years. Under this section the police commissioner is empowered to grant pensions in two cases only; where the disability occurs "while in the actual performance of duty and by reason of the performance of such duty," and where the member has served for more than ten years on the force. In each of these cases the limits of the pensions are between one-quarter and one-half of the salary the member has been receiving. So, if a member of the force sixty years old, were to be dismissed as disabled under this section, if he had served less than ten years he could receive no pension, and if he had served for that time his pension might be as low as a quarter of his salary; while if retired under the provisions of § 355, *post*, he would be entitled to receive, at the least, one-half of his salary. *People ex rel. Lindemann v. Bingham*, 198 N. Y. 274, rev'g 135 App. Div. 813, 120 N. Y. Supp. 186.

Disability.

While the provisions of this section do not in terms provide that a member of the police force shall not be retired for disability, except upon a certificate of the police surgeon, yet, inasmuch as the power of the police commissioner to retire and dismiss a member of the police force under this section is coupled with the power to grant a pension, it is necessary that the commissioner should base this action upon the certificate of the police surgeon, provided for in § 357, *post*. The certificate of the police surgeon, however, is not final and conclusive evidence of the disability of a member of the force, and where he is retired upon such a certificate in opposition to his wishes, he has the right to have the question of his disability determined by an alternate writ of mandamus. *Matter of Hodgins v. Bingham*, 196 N. Y. 123, rev'g 128 App. Div. 151, 112 N. Y. Supp. 543.

Striking name from pension roll.

The police commissioner has no power to summarily strike from the pension roll the name of a patrolman who had served faithfully for sixteen years and had been retired on account of disability incurred in the service, because of fraud in the issuance of his naturalization papers of which he had no knowledge. *In re Hickey*, 56 Misc. 118, 106 N. Y. Supp. 148.

Retirement upon twenty-five years' service.

A member of the police force who, of his own motion, obtains retirement after service of more than ten and less than twenty-five years, as provided

in this section, is entitled to a pension of one-half of his salary on the day of his retirement, but if removed for physical disability under § 354, *ante*, he is entitled only to such pension as the police commissioner grants him, not exceeding one-half nor less than one-fourth of his rate of compensation per annum. *Matter of Beal v. Bingham*, 60 Misc. 539, 112 N. Y. Supp. 465.

Retirement on reaching sixty years.

Under this section the police commissioner has the power upon his own volition to compulsorily retire upon a pension any member of the police force who has reached the age of sixty years, other than an honorably discharged soldier or sailor of the Mexican or late Civil War. *People ex rel. Lindemann v. Bingham*, 198 N. Y. 274, rev'g 135 App. Div. 813, 120 N. Y. Supp. 186.

Retirement for physical disability.

It is the duty of the police commissioner under this section to retire a member of the police force who has served more than twenty-five years, upon a certificate of the police surgeons that he is disabled; and the commissioner cannot be compelled by mandamus to reinstate such a member so retired by him on the ground that he is not in fact disabled. The rule is different where the retirement of a member of the police force upon a pension is made under § 354, *ante*. That section empowers the police commissioner to retire a police officer upon a pension only where he is in fact disabled and has been more than ten and less than twenty-five years in the service. Accordingly, where the retirement of a police officer is made under § 354, *ante*, the certificate of the police surgeons is not conclusive upon a police officer, retired in opposition to his wishes and an alternative writ of mandamus will lie to determine whether he is in fact disabled and unfit for police duties. *People ex rel. Tighe v. Bingham*, 66 Misc. 219, 121 N. Y. Supp. 273. To same effect see *People ex rel. Price v. Bingham*, 125 App. Div. 722, 110 N. Y. Supp. 136, aff'd 193 N. Y. 610.

The police commissioner has no power under this section to retire a member of the force upon a pension on account of physical disability without the certificate of the examining surgeon, stating that he is permanently disabled so as to be unfit for duty. *People ex rel. Metcalf v. McAdoo*, 184 N. Y. 268, aff'g 109 App. Div. 892, 96 N. Y. Supp. 868, aff'g 48 Misc. 420, 95 N. Y. Supp. 511.

A member of the police force is not subject to retirement on account of physical disability because he is unable to perform "full" police duty, i. e., every conceivable duty. A police officer who is able to perform with average efficiency the duties of the position which he holds is not "unfit for duty" within the meaning of that phrase as used in this section. Accordingly a certificate of the examining surgeons that a police officer is "unfit for the performance of full police duty" is fatally defective and confers no jurisdic-

tion upon the commissioner to retire such officer. *People ex rel. Metcalf v. McAdoo*, 184 N. Y. 268, aff'g 109 App. Div. 892, 96 N. Y. Supp. 868, aff'g 48 Misc. 420, 95 N. Y. Supp. 511.

A certificate of three police surgeons that a police officer is permanently disabled, and that the cause, nature and extent of such disability is defective vision, sufficiently states the cause of disability and authorizes the police commissioner, under this section and § 357, *post*, to place the officer on the pension roll. *Matter of Reynolds v. Bingham*, 126 App. Div. 289, 110 N. Y. Supp. 520, aff'd 193 N. Y. 601.

The certificate required by this section must be based upon the personal examination of the police surgeons designated to make the examination and must be made and signed by at least a majority of them. A certificate which purports to be made by the police surgeons as a board and is authenticated only by the officers of the board, is totally defective and confers no jurisdiction upon the police commissioner to retire a member of the force for alleged physical disability. *People ex rel. Metcalf v. McAdoo*, 184 N. Y. 268, aff'g 109 App. Div. 892, 96 N. Y. Supp. 868.

Proceedings to compel reinstatement.

The provisions of § 302, *ante*, that proceedings for the reinstatement of police officers dismissed from the force must be instituted within four months after the decision of the police commissioner sought to be reviewed, has no application to a proceeding brought to compel the restoration to active duty of a police officer unlawfully retired on a pension. A proceeding to compel the reinstatement of a police officer retired on a pension in violation of law may be instituted at any time, until barred by unreasonable laches. *People ex rel. Hurlbut v. Bingham*, 186 N. Y. 538; *People ex rel. Tims v. Bingham*, S. T., Part 1, Clinch, J., New York Law Jour., April 5, 1906, at p. 57.

The Court of Appeals has no jurisdiction to review an unanimous decision of the Appellate Division that a patrolman was not guilty of laches in instituting proceedings for reinstatement. *People ex rel. Hurlbut v. Bingham*, 186 N. Y., 538.

Striking name from pension roll.

Respecting the power of the police commissioner to strike from the pension roll the name of a patrolman who served many years in the department because of fraud in the issuance of his naturalization papers of which he had no knowledge, see *In re Hickey*, cited under § 284, *ante*.

§ 382. Borough president; qualifications, term, election, salary. (See 3d Ed., p. 269.)

Removal of borough president.

A borough president who has been removed from office by the governor upon the ground that he is unfit to hold office, cannot be re-elected to his

former position by the board of aldermen, for the unexpired term. *People v. Ahearn*; 196 N. Y. 221, aff'g 131 App. Div. 30, 115 N. Y. Supp. 664.

A subpoena issued by a commissioner appointed by the governor in proceedings instituted for the removal of a borough president should not be set aside on the ground that the witness may be asked questions, the answers to which may tend to incriminate him. This is so, although the witness is under indictment for offenses connected with the matter under investigation. *Matter of Phillips*, 143 App. Div. 522, 128 N. Y. Supp. 482, rev'g 70 Misc. 8, 127 N. Y. Supp. 1048.

President of borough; powers and duties. (See 3d Ed., p. 270.)

§ 383. The president of a borough shall, by virtue of his office, be a member of the local board of every district of local improvements in his borough, and chairman thereof, entitled to preside at its meetings and to vote as any other member. He shall have an office in such hall or public building of the borough as the board of aldermen may by resolution direct. He may appoint and at pleasure remove a commissioner of public works for his borough, who may discharge all the administrative powers of the president of the borough relating to streets, sewers, public buildings and supplies conferred upon him by this act; and who shall, in the absence, or illness of such president discharge all the duties of such president. He may also appoint and remove an assistant commissioner of public works who may discharge such powers and perform such duties as may be in writing conferred upon him by said president of the borough. He shall have power to appoint a secretary and such assistants, clerks and subordinates as he may deem necessary, if provision be made therefor by the board of estimate and apportionment and the board of aldermen. The said secretary, assistants, clerks and subordinates shall hold office at the pleasure of the president, subject to the provisions of the civil service laws. He shall, within the borough for which he shall have been elected, have cognizance and control:

1. Of regulating, grading, curbing, flagging and guttering of streets and laying of crosswalks.
2. Of constructing and repairing public roads.
3. Of paving, repaving, resurfacing and repairing of all streets, and of the relaying of all pavements removed for any cause.
4. Of the laying or relaying of surface railroad tracks in any public street or road, of the form of rail used, or character of foundation, and the method of construction, and of the restoration of the pavement or surface after such work.
5. Of the filling of sunken lots, fencing of vacant lots, digging down lots, and of licensing vaults under sidewalks.

6. Of the removal of incumbrances.
7. Of the issue of permits to builders and others to use of open the streets.
8. Of the construction and maintenance of all bridges and tunnels which are within his borough, and form a portion of the highways thereof, except such bridges as cross navigable streams.
9. Of all subjects relating to the public sewers and drainage of his borough, and shall initiate the making of all plans for the drainage of his borough, except as otherwise specifically provided in this act. He shall have charge of the construction of all sewers in accordance with said plans. He shall have in charge the management, care and maintenance of the sewer and drainage system of the borough of which he shall be president and the licensing of all cisterns and cess-pools.
10. Of the construction, repairs, cleaning and maintenance of public buildings, including markets, except schoolhouses, almshouses, penitentiaries and fire and police station houses, and other buildings whose care and custody are otherwise provided for in this act.
11. Of the care and cleaning of all offices leased or occupied for public uses.
12. Of the location, establishment, care, erection, and maintenance of the public baths, public urinals and public comfort stations; and of the placing of all signs indicating the names of the streets and other public places.

The president of each borough shall prepare all contracts relating to his borough, subject to the approval as to form by the corporation counsel. He shall have such other powers as are expressly conferred upon him by this act, and such other powers as may be conferred upon him by the board of aldermen. He shall make an annual report of the business and transactions of his borough to the mayor.

The presidents of the boroughs of Queens and Richmond shall, each for the borough of which he shall have been elected president, in addition to the powers above specified, have cognizance and control:

1. Of the sweeping and cleaning of the streets of the borough, and of the removal or other disposition as often as the public health and the use of the streets may require, of ashes, street sweepings, garbage, and other light refuse and rubbish, and of the removal of snow and ice from leading thoroughfares and from such other streets as may be found practicable.
2. Of the framing of regulations controlling the use of sidewalks and gutters by abutting owners and occupants for the disposition of sweepings, refuse, garbage or light rubbish, within the borough

which, when so framed, and approved by the board of aldermen, shall be published in like manner as city ordinances, and shall be enforced by the police department in the same manner and to the same extent as such ordinances, together with such other powers concerning street cleaning, as are expressly conferred upon them by this act.

3. The said presidents of the boroughs of Queens and Richmond shall have power to appoint such subordinates as may be necessary to enable them to carry into effect the provisions of this act regarding cleaning the streets of his borough, but the aggregate salaries of such officers shall not exceed in any one year the amount appropriated therefor by the board of estimate and apportionment and the board of aldermen. The said presidents of the boroughs of Queens and Richmond shall, so far as possible, select such subordinates from the members of the street cleaning department employed within said boroughs at the time when this act shall take effect. The said presidents of the boroughs of Queens and Richmond shall have such other powers relating to street cleaning within said boroughs as are conferred upon the commissioner of street cleaning by sections five hundred and forty-one, five hundred and forty-three, five hundred and forty-four and five hundred and forty-five of this act.

Whenever by any of the provisions of this act powers are conferred or duties are imposed upon a president of a borough, such powers may be exercised and such duties may be performed, upon the request of said president, by the commissioner of public works of said borough, if such official shall have been appointed; and if not, by any subordinate duly appointed by the president of said borough under the powers conferred upon him by this act, and duly designated thereto in writing; and such powers and duties when exercised or performed by such commissioner of public works or other appointee shall be regarded as having been exercised or performed by such president in the same manner as if such powers and duties had been actually exercised or performed by such president personally. (*As amended by L. 1907, ch. 383.*)

Powers and duties of borough president.

The borough president, subject to the control of the board of estimate and apportionment, is the proper person to determine when, how and under what circumstances a street shall be repaved. *City of New York v. New York City Railway Co.*, 132 App. Div. 156, 116 N. Y. Supp. 939.

The borough president under this section has the same power to organize bureaus in his department, as was conferred upon the commissioner of highways by § 458 of the preceding charter (L. 1897, ch. 378). Accordingly, the head of a bureau established by the president of a borough for the conven-

ience of administration, is entitled to the protection from summary removal given to the head of a bureau by § 1543, *post*. People *ex rel.* Collins *v.* Ahearn, 193 N. Y. 441, rev'g 124 App. Div. 939, 109 N. Y. Supp. 1141, and rev'g in effect People *ex rel.* Michaels *v.* Ahearn, 111 App. Div. 741, 98 N. Y. Supp. 492; People *ex rel.* Collins *v.* Ahearn, 120 App. Div. 95, 104 N. Y. Supp. 860.

The president of the borough under this section as amended by L. 1907, ch. 383, may be compelled by mandamus to remove permanent structures extending into a street. People *ex rel.* Cross *v.* Ahearn, 124 App. Div. 840, 109 N. Y. Supp. 249.

An application for a peremptory writ of mandamus, commanding the municipal authorities of the city vested with that duty to remove an alleged obstruction or encroachment upon a street, is a proceeding to enforce a right in which the general public is interested and may be maintained by a citizen and resident of the city without showing any special interest in, or damage done or suffered by such obstruction or encroachment. People *ex rel.* Mark Cross Co. *v.* Ahearn, 124 App. Div. 840, 109 N. Y. Supp. 249.

The fact that the relator has observed in silence the erection of a structure constituting an unlawful use of the street, will not estop him from maintaining mandamus to compel the borough president to remove the same. People *ex rel.* Mark Cross Co. *v.* Ahearn, 124 App. Div. 840, 109 N. Y. Supp. 249.

A foreman of stonecutters in the bureau of highways does not hold a statutory office to which the salary attaches as an incident; and, therefore, although, being a veteran, he was unlawfully discharged and afterwards reinstated, the city is not liable for his compensation during the period of removal. O'Donnell *v.* City of New York, 128 App. Div. 186, 112 N. Y. Supp. 760.

Where the commissioner of highways who had been removed by the borough president, instituted mandamus to compel his reinstatement and pending the proceeding, the borough president is removed by the governor, *held* that no further steps could be taken by the relator until the successor in office to the borough president had been substituted as a party to the proceeding. People *ex rel.* Collins *v.* Ahearn, No. 1, 137 App. Div. 260, 121 N. Y. Supp. 966; People *ex rel.* Walker *v.* Ahearn, 200 N. Y. 146.

The borough president cannot be charged personally with damages for the loss of salary suffered by the relator during his removal from office, where the removal was made in good faith, without improper motive, through a misunderstanding as to his powers under the charter. People *ex rel.* Walker *v.* Ahearn, 139 App. Div. 88, 123 N. Y. Supp. 845.

The commissioners of accounts, under § 119, *ante*, have the power to investigate the accounts and methods employed in the office of the borough president and report the results to the mayor. Matter of Hertle (*In re* Ahearn), 120 App. Div. 717, 105 N. Y. Supp. 765.

Powers and duties of commissioner of public works.

This section confers upon the commissioner of public works the power to act for the borough president upon his request or in case of his illness or absence. Where the commissioner of public works purports to act for the borough president it will be presumed that he does so under the authority of this section, and the burden of showing that he was not so authorized rests upon the party asserting the same. *Culp v. City of New York*, 146 App. Div. 326, 130 N. Y. Supp. 705.

The provision of this section authorizing the commissioner of public works to discharge the duties of the borough president in his absence or during his illness, refers only to the administrative powers of the borough president. The commissioner of public works is not authorized by this section to make appointments to office in the absence of the borough president. *People ex rel. Collins v. Ahearn*, No. 2, 137 App. Div. 265, 123 N. Y. Supp. 1135. Compare *Matter of O'Conner*, Sp. T., Giegerich, J., N. Y. Law Jour., June 13, 1911.

Liability of city for failure to construct or adopt proper plan for street drains, etc.

Where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is quasi judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the street or improvement made, the duty of keeping it in repair is ministerial, and for neglect to perform such a duty, an action by the party injured will lie. *Pitman v. City of New York*, 141 App. Div. 670, 125 N. Y. Supp. 941.

A sidewalk is presumed to be constructed according to a plan and on a grade established by the proper local authorities, and, where it is so constructed, negligence of the municipality cannot be based on the grade of the walk or its slope towards the gutter. *Owen v. City of New York*, 141 App. Div. 217, 126 N. Y. Supp. 38.

A city is not liable for injuries to a pedestrian because a sidewalk had been constructed of material which left it as smooth as glass. *Austen v. City of Dunkirk*, 140 App. Div. 44, 124 N. Y. Supp. 248.

The city is not liable for an injury sustained by a person slipping on the steps of a comfort station because the plan failed to provide for hand rail or for rubber or metal treads on the steps, unless it appear that the plans as made and executed were not adopted by the proper authorities. The burden of showing the absence of such adoption, is on the plaintiff. *Pitman v. City of New York*, 141 App. Div. 670, 125 N. Y. Supp. 941.

Liability of city for defective streets and sidewalks.

A city is not bound to furnish an absolutely safe and perfect highway under all circumstances. A reasonably safe condition is all that it is required to maintain, and, when it discharges that duty, it cannot be held culpable. *Hartnet v. City of New York*, 127 N. Y. Supp. 295.

The city is not liable for an injury sustained to a pedestrian through a slight defect, depression or difference in grade, in a sidewalk. *Terry v. Village of Perry*, 199 N. Y. 79, rev'g 130 App. Div. 907, 115 N. Y. Supp. 1146; *Powers v. City of New York*, 121 App. Div. 433, 106 N. Y. Supp. 166; *Butler v. Village of Oxford*, 186 N. Y. 444; *Davidson v. City of New York*, 133 App. Div. 352, 117 N. Y. Supp. 185.

Where a flagstone constituting part of a sidewalk had settled so that one corner was slightly lower than the edge of the adjoining flagstone, and a person, who was familiar with the walk and with such depression and had passed over the walk several times a day for several months, tripped at such depression and fell, *held*, that the city was not liable. *Terry v. Village of Perry*, 199 N. Y. 88; *Gastel v. City of New York*, 194 N. Y. 15; *Davidson v. City of New York*, 133 App. Div. 352, 117 N. Y. Supp. 185; *Butler v. Village of Oxford*, 186 N. Y. 444.

While the fact that one flagstone is raised above the other, does not of itself establish negligence on the part of the city, yet, where there is a hole underneath the raised flagstone sufficiently large to catch and hold a foot, the question of negligence is one for the jury. *Moroney v. City of New York*, 117 App. Div. 843, 103 N. Y. Supp. 1135, *aff'd* 140 N. Y. 560.

The city is not liable as a matter of law for injuries received from a hole in a flagstone three or four inches deep, twelve inches long and six inches wide. *Powers v. City of New York*, 121 App. Div. 433, 106 N. Y. Supp. 166.

A depression in the street five feet long, three feet wide, and five inches deep is of such a character that reasonably prudent men might differ as to the danger thereof and therefore the question of the negligence of the city in maintaining the same was for the jury. *Decker v. City of New York*, 132 N. Y. Supp. 558.

The liability of the city for injuries sustained to a pedestrian by stepping into a hole as large around as an ordinary barrel head and four inches deep, *held* to be a question of fact for the jury. *Lalor v. City of New York*, 132 N. Y. Supp. 539.

The city is liable for an injury sustained to a pedestrian by stepping into a hole in the middle of a sidewalk left by the removal of a flagstone which was two feet by four feet and from three inches to six inches deep and which had existed for eleven months, during which period similar accidents had occurred. *Dempsey v. City of New York*, 141 App. Div. 567, 126 N. Y. Supp. 290.

Where a pedestrian was injured by stepping into a hole in a sidewalk large enough to admit the whole foot up to the ankle, *held* that the question whether the city was negligent was one for the jury. *Murphy v. City of New York*, 142 App. Div. 62, 127 N. Y. Supp. 707.

The city is not liable for an injury sustained by a pedestrian, by stepping into an uncovered manhole where it does not appear who removed the cover of the manhole or the length of time it had been out of place. *Thomas v. City of New York*, 146 App. Div. 512, 131 N. Y. Supp. 697.

It is not the duty of the city to keep dirt paths such as are common to the outlying districts of the city, in as good condition for public travel as the sidewalk in the main part of the city. *Quinn v. City of New York*, 145 App. Div. 195, 129 N. Y. Supp. 1028.

A city, held not liable, for injuries to a pedestrian occasioned by his slipping upon a concrete incline five or six feet long, sloping from the top of a curb to the gutter, a perpendicular height of six inches, upon the ground that the city could not reasonably apprehend that the construction employed would be a menace to travelers or that one using reasonable care would be more apt to slip and fall upon such incline than he would be to slip and fall in making the abrupt descent which otherwise would have been left between the sidewalk and the gutter. *Stratton v. City of New York*, 190 N. Y. 294, rev'g 117 App. Div. 287, 103 N. Y. Supp. 358.

The court may take judicial notice of a fact that a slope in a sidewalk toward the curb of one and three-fourths inches in eleven feet is not unusual. *Owen v. City of New York*, 141 App. Div. 217, 126 N. Y. Supp. 38.

A survey of a sidewalk purporting to give exact measurements and which is admitted in evidence upon the consent of both parties, controls estimates given by witnesses respecting the level of the flagstones. *Hartnet v. City of New York*, 127 N. Y. Supp. 295.

A city which has cut a highway through a hill in a sparsely settled district is not negligent in failing to establish a sidewalk on the top of a bank from four to seven feet high, and is not liable for the injuries of a pedestrian who, while walking along the bank at night, fell into a slight depression. *Stadelmann v. City of New York*, 126 App. Div. 352, 110 N. Y. Supp. 682.

While a municipal corporation is not an insurer of travelers using its streets and owes no special duty to those who ride in automobiles, it is at all times bound to exercise due care to keep its public and much-used streets safe and free from dangerous defects, and such streets may be as freely used by those who ride in automobiles as by pedestrians or other travelers. *Corcoran v. City of New York*, 188 N. Y. 131, rev'g 114 App. Div. 910, 99 N. Y. Supp. 1136.

While it is the duty of a city to guard travelers upon its highways against such dangers as can or ought to be anticipated or foreseen in the exercise of reasonable care and prudence, it is not liable in damages for injuries resulting from extraordinary accidents which would not be guarded against in the exercise of such reasonable care and prudence. *Nicholls v. City of New York*, 128 App. Div. 532, 112 N. Y. Supp. 795.

Street railroads required to keep space between tracks in repair.

By § 98 of the Railroad Law (L. 1890, ch. 565; and L. 1892, ch. 676) there is imposed upon street surface railroad corporations the duty of keeping in permanent repair that portion of the street between the tracks, the rails of the tracks, and two feet in width outside of the tracks. The subsequent provisions to the effect that repairs must be made under the supervision of the local authorities whenever required by them, and in the manner they may prescribe, pertain only to the right of supervision and the manner in which the duty shall be performed and do not modify such duty or relieve railroads from a faithful discharge thereof. Nor does the provision, that "in case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation," apply to a dangerous condition of a street suddenly developing and needing immediate attention and repair in order to protect the public. It was intended to give a municipality power to compel a street surface railroad corporation to make that portion of a street, occupied by its tracks, conform to improvements or repairs made by the municipal authorities. *Schuster v. F. S. S. & M. & St. N. & R. Co.*, 192 N. Y. 403, aff'g 118 App. Div. 197, 102 N. Y. Supp. 1054.

Section 98 of the Railroad Law imposed the duty upon the defendant corporation to have and keep in permanent repair that portion of the street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks under the supervision of the proper local authorities. The obligation thus imposed is not only to repair a pavement existing at the time the consent was given or which should from time to time be maintained in the streets by the municipal authorities, but to have and keep in permanent repair, the portion of the street between the rails and track for a space of two feet outside of the rails. Where the condition of a street as a whole necessitates the laying down of a new pavement, a railroad corporation is required to bear its share of the expense of laying down such pavement. *City of New York v. New York City Railway Co.*, 132 App. Div. 156, 116 N. Y. Supp. 939.

Liability of city for injuries caused by street obstructions.

A city is chargeable with negligence where it allows a manhole to project at an unnecessary and improper elevation above the surface of the street. *Corr v. City of New York*, 121 App. Div. 578, 106 N. Y. Supp. 280.

Where the end of an iron pipe projected upward about two and one-half inches above a cement sidewalk, *held* that the question whether it was an

unlawful obstruction rendering the city liable for an injury occasioned by it, was one for the jury. *Pruss v. City of New York*, 69 Misc. 492, 127 N. Y. Supp. 498.

A wooden awning extending from the building line to the curb is an unlawful encroachment upon the public street and constitutes a nuisance; its existence for fifteen years raises no presumption that the owner had acquired a right to use the street, as the city had no power to grant to an individual such right; accordingly the city is liable for damages to a pedestrian injured by the fall of the awning. *Mansfield v. City of New York*, 119 App. Div. 199, 104 N. Y. Supp. 386.

Where a pedestrian was injured by tripping over a loose stone and it appeared that a loose stone of like character to that causing injury was seen in the immediate neighborhood for a week or two before the accident, but not in the position where the pedestrian fell; *held* that the city did not have constructive notice of the obstruction. *Orser v. City of New York*, 193 N. Y. 537, rev'g 127 App. Div. 335, 111 N. Y. Supp. 670.

Where a pedestrian tripped upon a stone which had been left in the street for a period of two weeks and had been moved about in various positions within a radius of six feet, *held*, that the city had constructive notice of the obstruction. *Moriarty v. City of New York*, 132 App. Div. 10, 116 N. Y. Supp. 323, aff'd 197 N. Y. 544.

Liability of city for not properly guarding excavations, embankments, bridges, etc.

A municipality maintaining a draw bridge equipped with gates to stop pedestrians while the draw is open, but which opened before the draw had completely reached its closed position, is not liable for injuries received by an infant who having thus gained access to the draw before it reached its final position, thrust her head between the outer railing of the draw and the railing of the bridge proper, so that she was injured when the draw was completely closed. *Nicholls v. City of New York*, 128 App. Div. 532, 112 N. Y. Supp. 795.

Liability of city for injuries caused by unsafe building.

The duty of a municipal corporation to keep its streets in a reasonably safe condition for public travel does not render it liable to a person injured by the collapse of a defectively constructed building where the person injured was in the building and not in the street at the time of its fall. *Stubley v. Allison Realty Co.*, 124 App. Div. 162, 108 N. Y. Supp. 759.

Liability of city for injuries occasioned by defective sewerage and drainage.

The city is liable for injuries to property occasioned by the inadequacy of a sewer although the connection between the sewer and the premises in question was defective by reason of the absence of proper check valves to prevent

the backing of water from the sewer. *Karfiol v. City of New York*, 119 App. Div. 70, 103 N. Y. Supp. 1036.

A city in constructing sewers is not bound to provide for extraordinary and excessive rainfalls, and is not liable because at a period of unusual and extraordinary rainfall, the sewers backed up and flooded private property. *Holzhausen v. City of New York*, 116 App. Div. 812, 102 N. Y. Supp. 145; *Ebbets v. City of New York*, 111 App. Div. 364, 97 N. Y. Supp. 833; *Judas v. City of New York*, 55 Misc. 259, 105 N. Y. Supp. 96.

A municipality is not under obligation to provide a system of sewerage sufficient to carry off surface water; and while it may not by means of sewers discharge sewage, or by constructing streets and gutters collect in a body surface water which would naturally flow in another direction and discharge it upon private property, it is not liable for damage caused by the discharge of surface water which is the result solely of grading streets and highways in pursuance of legislative authority. *Prime v. City of Yonkers*, 192 N. Y. 105.

The city is not liable for damages occasioned to an abutting owner from the natural flow of water over a street during an excessive rainfall. *Punsky v. City of New York*, 129 App. Div. 558, 114 N. Y. Supp. 66.

A municipality is not liable for damages to lands caused by surface waters flowing from an unpaved street without curb or sewage systems where such was the natural course of drainage before the street was laid out and the municipality has done nothing to change the course of surface water. *Jung v. City of New York*, 132 App. Div. 18, 116 N. Y. Supp. 368.

Where the city diverts surface water from its natural channel and causes it to flow by an artificial channel upon the property of an adjoining owner, the city will be liable for damages occasioned thereby. *Punsky v. City of New York*, 129 App. Div. 558, 114 N. Y. Supp. 611.

A municipal corporation is not liable for damages resulting from an overflow caused by obstructions to a drain, unless it had prior notice of such obstructions for a sufficient length of time to have enabled it to prevent the injury. *Bayer v. City of New York*, 141 App. Div. 679, 126 N. Y. Supp. 455.

When the obstruction of a sewer is the result of ordinary use which ought to have been anticipated and could have been guarded against by occasional examination and cleansing, the omission to make the examination and keep the sewer clear is a neglect of duty which renders the municipality liable for injuries caused thereby. *Gravey v. City of New York*, 117 App. Div. 773, 102 N. Y. Supp. 1010.

Liability of city for injuries occasioned by accumulation of ice and snow.

A municipal corporation is not liable for an injury resulting from a smooth coating of ice on a sidewalk during the winter season, where there is no ridge,

unevenness or other unusual condition of the walk, and where no fact is shown indicating negligence on the part of the municipal authorities, except a slippery walk, caused by a low temperature, in consequence of which all the streets within the municipality have become coated with ice. *Brennan v. City of New York*, 117 App. Div. 849, 103 N. Y. Supp. 266.

The duty resting upon a municipal corporation to remove accumulations of ice and snow from its streets and sidewalks becomes imperative only, when dangerous formations or obstacles have been created and notice of their existence has been received by the corporation, or sufficient time has elapsed to afford a presumption of knowledge of their existence and an opportunity to effect their removal. *Owen v. City of New York*, 141 App. Div. 217, 126 N. Y. Supp. 38.

Where a pedestrian fell upon an accumulation of snow and ice upon a sidewalk which had been worn into ridges and was very rough and uneven and it appeared that it had remained in this situation for many days during mild weather following a storm, *held*, that the city was liable for the injuries sustained by the pedestrian. *Larson v. City of New York*, 145 App. Div. 619, 130 N. Y. Supp. 257.

Where a pedestrian slipped upon an accumulation of ice caused by water flowing from a broken leader on an adjoining house and the condition had existed for more than a year, *held*, that the city was liable for the injuries sustained. *Duffy v. City of New York*, 128 App. Div. 837, 113 N. Y. Supp. 118.

The city is not guilty of negligence in failing to clear its streets of snow within twenty-four hours after a snow fall. *Owen v. City of New York*, 141 App. Div. 217, 126 N. Y. Supp. 38; *Schneider v. City of New York*, 143 App. Div. 216, 128 N. Y. Supp. 45.

No greater duty devolves on the city with respect to the removal of snow and ice from walks in front of public schools than with respect to snow and ice which accumulates in front of private premises. *Owen v. City of New York*, 141 App. Div. 217, 126 N. Y. Supp. 38.

Necessity of notice to city of dangerous condition of streets, drains, etc.; what constitutes notice.

Before a city can be charged with negligence in failing to repair or safeguard a defect in a public street, or for failure to remove a dangerous obstruction thereon, it must have actual notice of the same, or the same must have existed for such a length of time as to charge the city with implied or constructive notice of its existence. *McKee v. City of New York*, 135 App. Div. 829, 120 N. Y. Supp. 149; *Orser v. City of New York*, 193 N. Y. 537, *rev'g* 127 App. Div. 335, 111 N. Y. Supp. 670; *Suchovalsky v. City of New York*, 126 N. Y. Supp. 699; *Hartnet v. City of New York*, 127 N. Y. Supp. 295; *Thomas v. City of New York*, 131 N. Y. Supp. 697.

Where a depression between the tracks of a street railroad was caused by a heavy rain storm lasting nearly twenty-four hours, and a pedestrian was injured by stepping into the depression only two or three hours after the rain had ceased, the city is not chargeable with constructive notice so as to be liable for negligence in failing to repair or safeguard the defect. *McKee v. City of New York*, 135 App. Div. 512, 120 N. Y. Supp. 149.

Where the steps of a public comfort station had been worn smooth for more than a year; *held* that the question whether the city was negligent and whether it had constructive notice of the condition was one for the jury. *Pitman v. City of New York*, 141 App. Div. 670, 125 N. Y. Supp. 941.

Liability of city for negligence of contractor.

A municipal corporation must keep its streets in a safe condition for public travel and it cannot absolve itself from this liability by an attempted delegation of its duty in this respect to an independent contractor, who is prosecuting a public improvement in a street. *Newman v. City of New York*, 57 Misc. 636, 108 N. Y. Supp. 676.

The city is not liable for a dangerous condition of the street created by a contractor where the obstruction or defect in the street causing the injury is wholly collateral to the contract work and entirely the result of the negligence or wrongful acts of the contractor's subcontractor or his servants. In such case the immediate author of the injury is alone liable. *McNamara v. City of New York*, 144 App. Div. 504, 129 N. Y. Supp. 230.

The city is not liable for injuries to abutting property by an explosion of dynamite occasioned by the negligence of a subcontractor engaged in building the subway. *Smyth v. City of New York*, 203 N. Y. 106, mod'g 128 App. Div. 463, 112 N. Y. Supp. 807.

A contractor with the city engaged in building a subway is primarily liable for injuries to property occasioned by the negligence of his subcontractor under a provision of the contract providing that "the contractor shall be responsible for all damages which may be done to abutting property or buildings or structures thereon by the method in which the construction hereunder shall be done." *Smyth v. City of New York*, 203 N. Y. 106, mod'g 128 App. Div. 463, 112 N. Y. Supp. 807.

The city is not liable for injuries to property caused by the bursting of a water main built by a contractor engaged in construction, under the Rapid Transit Act, unless it knowingly or carelessly puts an unsafe or improperly constructed main into use; its only duty is to exercise reasonable care to see that the work is properly done. *Kelsey v. City of New York*, 123 App. Div. 381, 107 N. Y. Supp. 1089.

Liability of city for negligence of one holding a license to use highway; builder.

A city has no power to grant to an individual any right in the streets which

will interfere in any degree with the safe use by the public, and cannot authorize the maintenance of awnings which by their construction are a nuisance on the public thoroughfare. *Mansfield v. City of New York*, 119 App. Div. 199, 104 N. Y. Supp. 386.

An abutting owner who erects a structure bridging a vault which was being built beneath the sidewalk, cannot escape liability for an injury occasioned by its defective condition, upon the ground that the work was done by a contractor. *City of New York v. Corn*, 133 App. Div. 1, 117 N. Y. Supp. 514.

Rights of person using highways; contributory negligence.

It is not negligence as matter of law for a person to use a street or sidewalk which he knows to be in a dangerous condition. The question whether a person thus crossing a dangerous street is guilty of contributory negligence, is one of fact for the jury. *Mayhood v. City of New York*, 119 App. Div. 100, 109 N. Y. Supp. 856.

A pedestrian who in daylight goes upon a street which she knows to be under repair, the entrance to which is barred by a sign reading "street closed," and while looking behind her to ascertain the cause of a noise, walks into an open manhole which was plainly visible, is guilty of contributory negligence and not entitled to recover. *Wrigley v. City of New York*, 122 App. Div. 402, 106 N. Y. Supp. 812.

Admissibility and effect of evidence of condition of highway, prior or subsequent to accident.

Evidence of prior accidents may be received, when the question of negligence is debatable, to show that an alleged defect in a sidewalk has proved dangerous and is calculated to cause accidents, but such evidence is not of itself sufficient to sustain a charge of negligence. *Gostel v. City of New York*, 194 N. Y. 15; *Terry v. Village of Perry*, 199 N. Y. 88. See *Maroney v. City of New York*, 117 App. Div. 843, 103 N. Y. Supp. 1135, aff'd 190 N. Y. 560.

Evidence that a street was repaired subsequent to an accident, is inadmissible to fix liability upon the city. *Quinn v. New York*, 145 App. Div. 195, 129 N. Y. Supp. 1028.

The fact that there is no proof of prior accidents occasioned by a defective street, does not exonerate the city from liability for injuries occasioned to a pedestrian by such defect. *Maroney v. City of New York*, 117 App. Div. 843, 103 N. Y. Supp. 1135, aff'd 190 N. Y. 560.

Recovery by city from party primarily liable of amount paid by it to person injured.

Where a municipal contractor has been asked by the city to defend an action to recover for personal injuries caused by his negligence, and has re-

fused to do so, and has acquiesced in an appeal from the judgment by the city to the extent of expressing a hope that the city would win, the city when sued by the contractor for a balance due under the contract may offset not only the amount of the judgment recovered against it, but also the expenses

~~of the City of Yonkers 131 App. Div. 199, 115 N. Y.~~

§ 388. Devolution of powers of former officers; highways.
(See 3d Ed., p. 286.)

The power of the commissioner of highways under former N. Y. City Charter of 1897, § 458 including the amendments.

paid their several shares of the cost of the construction of said sewer, but when the same shall have been fully paid for by all the owners of abutting property, then the same shall be the property of the city of New York, and deemed to have been fully dedicated to said city.

2. Or upon the parties proposing to construct such sewer first filing with the president of the borough where said sewer is to be constructed, plans and specifications of such proposed sewer and a duplicate copy of the contract for the construction of such sewer, showing the estimated cost of the construction thereof, together with a satisfactory guarantee to said borough president for the payment both of the cost of the construction of such sewer and of the necessary expense of said department of sewers in the supervision of the construction of such sewer, and also a satisfactory guarantee to said borough president for the maintenance of said sewer free of all cost and expense to the city of New York. Upon approval of such plans, specifications, contracts and guarantees by the said borough president, he shall issue his permit for the construction of such proposed sewer. The said borough president may grant permits for connection with said sewer to be constructed as aforesaid to other persons or corporation, upon approval of application therefor by the board of estimate and apportionment of the city of New York, and upon such terms and conditions as said board may deem just and equitable, as between the parties who shall have constructed and paid for said sewer and the parties making application for such connection. And when constructed said sewer shall be the property of the city of New York and deemed to have been fully dedicated to said city. (*As amended by Laws 1906, ch. 597.*)

3. Or in all districts where the resident population does not average one hundred persons per ordinary city block, upon the following conditions:

When the party, parties, or corporation proposes to construct such sewers they are first to file with the president of the borough where said sewer is to be constructed, plans and specifications of such proposed sewer, with a satisfactory guarantee to said borough president for the payment of the necessary expenses to the department of sewers in the supervision of the construction of said sewer, and a petition signed by a majority of resident property owners, in feet of frontage abutting on the street or streets in which the sewer is intended to be laid, which petition shall set forth the block

heat, lights, books, stationery and other supplies suitable and sufficient for the transaction of its business; and, upon an order of the court therefor, with suitable and proper food, lodging and expenses for juries kept together either during the progress of a trial or after their retirement for deliberation. If he shall neglect so to do the court, or any justice thereof, may order the sheriff to make the requisite provision. (*Added by L. 1911, ch. 834.*)

§ 405. Appointment of superintendents; qualifications; jurisdiction; salaries. (See 3d Ed., p. 298.)

Liability of city for acts of building department.

The city is not liable for the negligence of the officers of the building department in approving defective building plans. The bureau of buildings in discharging its duties, performs a public service in which the city has no private or corporate interest. *Stubley v. Allison Realty Co.*, 124 App. Div. 162, 108 N. Y. Supp. 759.

The bureau of buildings is not an administrative department of the city as a whole, but merely a suboffice of the president of the borough, and the city is not liable for damages sustained by reason of any neglect or default on the part of the superintendent of the bureau in enforcing the law relative to the construction of buildings. *McGuinness v. Allison Realty Co.*, 46 Misc. 8, 93 N. Y. Supp. 267, *aff'd* 111 App. Div. 926, 97 N. Y. Supp. 1141.

§ 406. Duties of superintendents; appointment and removal of subordinates. (See 3d Ed., p. 299.)

Appointment of employees.

The superintendent of buildings in appointing subordinate officers, is limited by the amount of the appropriation for salaries. *Matter of Colihan v. Miller*, 72 Misc. 140, 131 N. Y. Supp. 99.

§ 406. Duties of superintendents; appointment and removal of subordinates. (See 3d Ed., p. 299.)

Approval of plans.

Mandamus will lie to compel approval of plans and specifications for the erection of a building, although upon land within the lines of a proposed street laid down upon a city map, but as to which the city has acquired no title. *People ex rel. Swain v. Reveille*, 50 Misc. 474, 100 N. Y. Supp. 584.

The approval of the superintendent of buildings is not necessary to the plans of the municipal building authorized under L. 1907, ch. 670, where the board of estimate and apportionment approved the same when presented by the commissioner of bridges. *Schieffelin v. City of New York*, 65 Misc. 609, 112 N. Y. Supp. 502; *Wheeler v. The Same*, 122 N. Y. Supp. 627.

This section confers no authority upon the superintendent of buildings to decide that trade fixtures are part of the permanent construction of a building and must conform to the requirements of law applicable thereto. *City of New York v. Stewart Realty Co.*, 109 App. Div. 702, 96 N. Y. Supp. 513.

The superintendent of buildings cannot refuse to pass upon an application to make alterations to buildings according to plans and specifications approved by the tenement house department because the borough president has not granted a permit to remove the buildings from land owned by the city to land owned by the applicant; the permission of the borough president to move the buildings across the highway and the permission of the superintendent of buildings to make alterations being independent, and neither is a condition precedent to the granting of the other. *Hurwitz v. Moore*, 132 App. Div. 29, 116 N. Y. Supp. 248.

The superintendent of buildings cannot refuse permission to make alterations upon buildings formerly owned by the city, upon the ground that they were not sold by the comptroller at public auction as required by § 1553, *post*. *Hurwitz v. Moore*, 132 App. Div. 29, 116 N. Y. Supp. 248.

Mandamus will lie to compel the issuance of a permit by the municipal authorities to move a building from one part of a lot owned by a party to another part of such lot, and the fact that the city is about to condemn the land upon which the owner seeks to remove his building, furnishes no ground for the refusal of the permit. *People ex rel. Squire v. Reville*, Sp. T., Dowl-
ing, J., N. Y. Law Jour., November 16, 1906.

§ 407. Continuation and repeal of existing laws; building code. (See 3d Ed., p. 300.)

Excavations below ten feet.

Building Code, § 22, which provides that parties making excavations of more than ten feet shall preserve the wall of buildings on adjoining land from injury, if afforded license to enter thereon, does not apply where the same person owns both pieces of property, and imposes no obligation upon the landlord with respect to a tenant of the building to protect its walls against excavation of the landlord's adjoining land. *Paltey v. Egan*, 122 App. Div. 512, 107 N. Y. Supp. 444.

Building Code, § 22, providing that persons making excavations of more than ten feet shall preserve the wall of buildings on adjoining land, applies not only to a case where the excavation is actually more than ten feet, but also where an excavation is begun, which the party making it, attempts to carry down more than ten feet although such intention may not be carried out. *Foster v. Zampieri*, 140 App. Div. 471, 125 N. Y. Supp. 422; *Blanchard v. Savarese*, 97 App. Div. 58, 89 N. Y. Supp. 665, *aff'd* 184 N. Y. 537.

Building Code, § 22, providing that whenever an excavation for a building "shall be intended to be or shall be carried to the depth of more than ten feet" the person causing the excavation shall preserve the wall of adjoining building from injury: *Held* that the words "shall be carried" in addition to the words "shall be intended" indicate a legislative intent not to exempt the owner from liability merely because the excavation he had intended was not to be more than ten feet, if in fact it should be carried below that depth. *Rosenstock v. Lane*, 67 Misc. 251, 122 N. Y. Supp. 525.

Under Building Code, § 22, providing that persons making excavations of more than ten feet shall preserve the wall of building on adjoining land, etc., the word "person" means the owner or lessee doing the work. *Post v. Kerwin*, 133 App. Div. 404, 407, 117 N. Y. Supp. 761, 763.

Building Code, § 22, relating to excavations and the protection of adjoining property, apply only to adjacent properties under private ownership, and not to excavations in a public street. *N. Y. Steam Co. v. Foundation Co.*, 195 N. Y. 43, rev'g 123 App. Div. 254, 108 N. Y. Supp. 86, on other grounds.

Sheds over sidewalks.

Building Code, § 80, providing that when buildings are erected, or increased over 65 feet in height, the owner, builder or contractor constructing them, shall maintain a shed over sidewalk to protect pedestrians and others on the street, *held* that a contractor failing to maintain the shed during construction is guilty of negligence causing death of a mortar mixer by falling of masonry. *Shields v. Paul B. Pugh & Co.*, 122 App. Div. 586, 107 N. Y. Supp. 604.

Elevators.

Building Code, § 95, providing that elevators in buildings shall be provided with guards kept closed except when in actual use, and that half doors shall be closed at close of business day, *held* that an owner of a building violating this provision is liable to a police officer, who discovering an outside door of the building open after business hours, and entering the building to discover the cause, fell through an unguarded elevator well left in that condition by the occupants. *Racine v. Morris*, 201 N. Y. 240, aff'g 136 App. Div. 467, 121 N. Y. Supp. 146.

The provisions of L. 1892, ch. 275, §§ 22, 23, amending the Consolidation Act, L. 1882, ch. 410, and requiring hoistways or elevators to have a substantial guard and trapdoors which shall be closed at the close of the business of each day, have been repealed by the enactment of the Building Code under the authority of this section. *Kenney v. Brooklyn Bridge Stores Co.*, 121 App. Div. 684, 106 N. Y. Supp. 421.

Dumb waiters.

Building Code, § 97, providing that all dumb waiter shafts except such as do not extend more than three stories above the basement in dwelling houses,

should be enclosed in walls of brick, or such other fireproof material as approved by superintendent of buildings, is constitutional and retroactively applies to all buildings erected before its enactment. *City of New York v. Foster*, 72 Misc. 67, 129 N. Y. Supp. 620, aff'd 133 N. Y. Supp. 152.

Fireproofing.

Building Code, § 105, which provides that in buildings of a certain height "the inside window frames . . . and other interior finish may be of wood covered with metal or of wood treated by some process approved by the board of buildings to render the same fireproof," applies only to interior finish which is part of the permanent structure. It has no application to ordinary trade fixtures such as dwarf partitions, shelves, cases, counters, etc. and confers no authority to restrain the use of such trade fixtures constructed of wood. *City of New York v. Stewart Realty Co.*, 109 App. Div. 702, 96 N. Y. Supp. 573.

Department house not within Tenement House Act.

A modern apartment house does not fall within the definition of a tenement house under L. 1901, ch. 334, and is not subject to the supervision of the tenement house department but is only subject to the provisions of the Building Code of the city. *Grimmer v. The Tenement House Department*, Ct. of App., N. Y. Law Jour., Feb. 26th, 1912.

Schools.

Building Code, § 105, providing that every building erected or altered for use as a school shall be built fireproof does not apply to the use of a non-fireproof building for a school when it appears that the owner in good faith made alterations in the building for use as offices and stores and subsequently leased portions of the building for a school. *City of New York v. Realty Associates*, 133 App. Div. 250, 117 N. Y. Supp. 207.

Theaters.

Building Code, § 109 (which went into effect in 1899), regulating building of theaters "hereafter erected" in conformity with certain requirements, and § 109a providing that § 109 shall not apply to a theater, etc., "now enacted": *Held* that where a building used as a theater was separated by a solid wall from buildings in the rear, plans presented to building department for approval contemplating the removal of the wall and the substitution of a new building on the site of the old buildings, which was to be connected with the theater into one building, were not within the exception of § 109a. *Brill v. Miller*, 140 App. Div. 602, 125 N. Y. Supp. 865.

Registration of plumbers.

Building Code, § 141, subd. 3, providing that no "copartnership," etc., shall engage in business of employing or master plumber unless the name and address of "each and every member of such copartnership" shall have been registered in the Department of Buildings, is unconstitutional so far as it prohibits the formation of a partnership to carry on the lawful business of employing or master plumbers; nor can it be sustained as a valid exercise

of the police power for the reason that the registration of the firm as such or for the registration of one or more members of the firm who are skilled plumbers to act for the firm would be sufficient protection to the public from all the dangers that the legislation was supposed to prevent or mitigate; and non-registration of one member of a firm is no defense to action by firm for work performed in violation of the statute. *Schnaier v. Navarre Hotel & Importation Co.*, 182 N. Y. 83, rev'g 82 App. Div. 25, 81 N. Y. Supp. 946.

A corporation is a "person" under General City Law (L. 1909, ch. 26) requiring registration of employing or master plumbers in any city of the state, and N. Y. City Building Code, § 141, subd. 3, providing that no person, corporation or copartnership shall engage in business of employing or master plumber in the city of New York unless the name and address of such person and the president, secretary or treasurer of such corporation, etc., shall have been registered in the Department of Buildings, no corporation can recover for plumbing work unless registered, and the fact of such registration must be pleaded in the action to recover for the work, the courts not taking judicial notice of the provisions of the Building Code. *Schnaier Co. v. Grigsby*, 132 App. Div. 85, 117 N. Y. Supp. 455, aff'd 199 N. Y. 577; *Messer Co. v. Rothstein*, 129 App. Div. 215, 113 N. Y. Supp. 772, aff'd 198 N. Y. 532.

Sky signs.

A sky sign attached to a building is a "structure" within the meaning of the provisions of this section authorizing the board of aldermen to regulate the construction of buildings or other structures. *City of New York v. Wineburgh Adv. Co.*, 122 App. Div. 748, 107 N. Y. Supp. 478.

Building Code, § 144, limiting the height of billboard or sky signs erected on the roofs of buildings upon private property, for the display of advertisements to nine feet above the front wall of the building and prohibiting the erection of higher signs, no matter how well secured, is arbitrary, unauthorized, invalid and unconstitutional, where it appears from the ordinance itself that it was not enacted in the interest of public health, morals or safety, or for any other purpose within the police power, but simply to prevent or restrict the display of advertisements. *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, aff'g 129 App. Div. 260, 113 N. Y. Supp. 855.

Where a party under a permit authorizing the construction of a sky sign of nine feet in height erects one of a much greater height, such structure is unauthorized and stands upon the same footing as if the sign had been erected without a permit. It is no ground of justification that the party challenges the constitutionality of the provision of the building code restricting the height of sky signs to nine feet because assuming the contention to be well founded, it would not authorize the erection of a sky sign of any height without a permit. *City of New York v. Wineburgh*, 122 App. Div. 748, 107 N. Y. Supp. 478; *Matter of City of New York*, 122 App. Div. 741,

107 N. Y. Supp. 484; City of New York v. Wineburgh, 124 App. Div. 641, 109 N. Y. Supp. 335.

Building Code, § 144.

Building Code, § 144, as amended by the Board of Aldermen by Ordinance No. 372, of July 1, 1902, does not apply to an ordinary commercial sign affixed to a building wall to indicate the business of the occupant, without a permit from the superintendent of buildings, the section as amended, having reference only to "billboards" and "sky signs." People v. Schmidt, 51 Misc. 258, 100 N. Y. Supp. 1094.

Unsafe buildings.

Under Building Code, §§ 153-158, providing a scheme compelling owners of unsafe buildings to make them safe, including court proceedings to recover the expense incurred by the public authorities to make the building safe, in default of the owner doing so, no lien is given for work done and expenses incurred independent of and preliminary to the court proceedings, and therefore a *lis pendens* filed by the city, under these code provisions, was cancelled where it appeared that the owner had done all of the work required by the city in the proceedings. *In re Unsafe Building*, 130 App. Div. 396, 114 N. Y. Supp. 318.

The city is not liable to a person injured by the collapse of a building because the board of aldermen has neglected to pass an ordinance relating to the construction of building which would have prevented the collapse. *Stubley v. Allison Realty Co.*, 124 App. Div. 162, 108 N. Y. Supp. 759.

The costs and expenses incurred for the preliminary search and survey of an alleged unsafe building cannot be recovered until final judgment is rendered declaring the building unsafe and directing a precept to issue for its removal, and such precept has been returned with an indorsement of the action thereunder. *Alpern v. Farrell*, 133 App. Div. 278, 117 N. Y. Supp. 706.

Removing debris of fallen building.

Building Code, § 157, providing that in case of fallen building where persons are known to be buried under ruins, etc., the department of buildings shall cause the necessary work to be done to render the building temporarily safe, does not authorize the department to contract for the storage of any materials taken from the collapsed building, nor to employ watchmen to guard the materials. *People ex rel. Dunn v. Metz*, 115 App. Div. 269, 100 N. Y. Supp. 913.

Bay windows.

The superintendent of buildings, has no authority under this section over the streets so as to authorize the bay window of a building to extend more than a foot from the wall over the public highway. *Heyman v. Streich*, 114 N. Y. Supp. 603, aff'd 134 App. Div. 175, 118 N. Y. Supp. 1113.

Fire escapes.

Irrespective of the Building Code of the city, the duty rests upon the

owner of a factory building under Labor Law (L. 1897, ch. 415, § 82) to provide fire escapes, the general law applying to the city except in so far as a different administrative scheme is provided for the city by the Building Code in force under this section. *Maioria v. Myers*, 131 App. Div. 210, 115 N. Y. Supp. 923; *Gaspero v. The Same*, 131 App. Div. 915, 115 N. Y. Supp. 925.

Where the owner of a building neglected to comply with an order requiring him to provide adequate fire escapes, *held*, that the question whether the omission to provide such fire escapes was the proximate cause of the death of an employee occasioned by jumping from the fourth story of the burning building was for the jury to determine. *Sembler v. Cowperthwait*, 53 Misc. 28, 103 N. Y. Supp. 979.

Enforcement of Building Code.

The Building Code, enacted pursuant to this section, has the same force within the corporate limits of the city as a statute passed by the legislature. *City of New York v. Trustees of Sailors Snug Harbor*, 85 App. Div. 355, 83 N. Y. Supp. 442, *aff'd* on opinion below, 180 N. Y. 527; *Schnaier v. Navarre Hotel & Importation Co.*, 182 N. Y. 83, 85; *Messer v. Rothstein*, 129 App. Div. 215, 113 N. Y. Supp. 772, *aff'd* 198 N. Y. 532; *Schnaier Co. v. Grigsby*, 132 App. Div. 85, 117 N. Y. Supp. 455, *aff'd* 199 N. Y. 577; *Post v. Kerwin*, 133 App. Div. 404, 117 N. Y. Supp. 761.

Violations of the provisions of the Building Code mentioned in this section, cannot be restrained by summary order of the court, but are governed by § 506 of the Consolidation Act, L. 1882, ch. 410, as amended by L. 1882, ch. 275, requiring an appropriate action or proceeding at law or in equity by injunction. *City of New York v. O. J. Gude Co.*, 122 App. Div. 741, 107 N. Y. Supp. 484; *Same v. Wineburgh Adv. Co.*, 122 App. Div. 748, 107 N. Y. Supp. 478; *The Kobbe Co. v. City of New York*, 122 App. Div. 755, 107 N. Y. Supp. 478.

§ 411. Appeal to board of examiners. (See 3d Ed., p. 304.)

The powers conferred upon the board of examiners to allow "an equally good or more desirable form of construction" to be employed, authorizes the board to permit a modification of the requirements of § 10 of the Building Code relating to air spaces in favor of a proposed hotel occupying an entire block. *Sp. T., Guy, J., Matter of Greeley Square Hotel Co.*, N. Y. Law Jour., March 16th, 1911.

Contracts for work or supplies. (See 3d Ed., p. 309.)

§ 419. All contracts to be made or let for work to be done or supplies to be furnished, except as in this act otherwise provided, and all sales of personal property in the custody of the several borough presidents, departments or bureaus shall be made by the appropriate borough presidents or heads of departments under such regulations as shall be established by ordinance or resolution of the board of

aldermen. Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for The City of New York, and the several parts of the said work or supplies shall, together, involve the expenditure of more than one thousand dollars, the same shall be by contract, under such regulations concerning it as shall be established by ordinance or resolution of the board of aldermen, excepting such works now in progress as are authorized by law or ordinance to be done otherwise than by contract, and unless otherwise ordered by a vote of three-fourths of the members elected to the board of aldermen; and all contracts shall be entered into by the appropriate borough president, and heads of departments, and shall, except as herein otherwise provided, be founded on sealed bids or proposals, made in compliance with public notices, duly advertised in the City Record, and the corporation newspapers, and said notice to be published at least ten days; if a borough president or the head of a department shall not deem it for the interest of the city to reject all bids, he shall, without the consent or approval of any other department or officer of the city government, award the contract to the lowest bidder, unless the board of estimate and apportionment by a three-quarter vote of the whole board, shall determine that it is for the public interest that a bid other than the lowest should be accepted; the terms of such contract shall be settled by the corporation counsel as an act of preliminary specification to the bid or proposal.

In any contract for work or supplies made hereunder, there may be inserted, in the discretion of the borough president or head of department making such contract, a provision that additional work may be done or supplies furnished for the purpose of completing such contract, at an expense not exceeding five per centum of the amount of such contract, if such additional work or supplies shall be ordered by such borough president or head of department.

The bidder whose bid is accepted shall give security for the faithful performance of his contract in the manner prescribed and required by ordinance; and the adequacy and sufficiency of this security shall, in addition to the justification and acknowledgment, be approved by the comptroller. All bids or proposals shall be publicly opened by the officer or officers advertising for the same, and in the presence of the comptroller, but the opening of the bids shall not be postponed if the comptroller shall, after due notice, fail to attend; if the bidder whose bid has been accepted shall neglect or refuse to accept the contract within five days after written notice that the same has been awarded to his bid or proposal, or if he accepts but does not execute

the contract and give the proper security, it shall be readvertised and relet as above provided. In case any work shall be abandoned by any contractor, it shall be readvertised and relet by the appropriate borough president or the head of the appropriate department in the manner in this section provided. No bid shall be accepted from, or contract awarded to, any person who is in arrears to The City of New York upon debt or contract, or who is a defaulter, as surety or otherwise, upon any obligation to the city. Every contract when made and entered into, as before provided for, shall be executed in duplicate, and shall be filed in the department of finance; together with a copy of the resolution or ordinance of the board of aldermen and the local board, and together with the approval of the board of estimate and apportionment wherever the same is required by the provisions of this act, or copies of both, as the case may be, authorizing said work; such copy shall be so filed within five days after the contract shall have been duly executed by the contractor. All warrants upon vouchers duly audited and approved, for payment of amounts due under contracts, shall, by number or other description, refer to the voucher, the fund and the contract upon which the payment is to be made; and all checks drawn by the chamberlain on warrants duly approved and executed pursuant to law, as payments on contracts, may be mailed to the contractor at the address furnished by him, or delivered to him or his authorized representative, and when so mailed or delivered, the indorsement by the contractor upon a check attached to such a warrant, which has been paid by the bank or trust company upon which the same has been drawn, shall be considered as a receipt of the contractor for the amount of said check so paid on account of said contract.

No expenditure for work or supplies involving an amount for which no contract is required shall be made, except the necessity therefor be certified to by the appropriate borough president or the head of the appropriate department, and the expenditure has been duly authorized and appropriated. (*As amended by L. 1910, ch. 554.*)

Scope of section.

The settled law for the city is that contracts for new work or supplies, or for the completing or perfecting of any work when the amount involved is more than \$1,000, shall be made by the borough president, or heads of the department upon public letting after due advertisement upon preliminary statements and estimates by sealed bids, and, except in exceptional cases provided for by law, to the lowest bidder. *Cahn v. Metz*, 115 App. Div. 516, 101 N. Y. Supp. 392.

The Board of Health is not controlled in the awarding of contracts for the removal of refuse by the provisions of this section. The board is vested with

the discretionary powers on awarding such contracts by §§ 1205 and 1206, *post*, and in the absence of fraud or deception, the court has no right to interfere with the action of the board. *Van Iderstine v. Department of Health*, 65 Misc. 608, 122 N. Y. Supp. 468.

Mode of contracting with city.

The provisions of this section provide four ways in which the city can be obligated to pay for contract work: (1) By contract authorized by the vote of three-fourths of the members of the board of aldermen; (2) when the work and supplies involve an expenditure of more than \$1,000, by contract founded upon competitive bidding; (3) by order of the appropriate head of the department for additional work for the purpose of completing any contract, at the expense not exceeding five per centum of the amount of such contract; and (4) by contract without competition where the amount is less than \$1,000 and the necessity therefor is certified to by the appropriate head of department and the expenditure has been duly authorized and appropriated. *Dady v. City of New York*, 65 Misc. 382, 121 N. Y. Supp. 860.

Proposals and specifications.

The omission to designate definite specifications upon a proposal for bids is not a mere irregularity, but a direct violation of the statute, prescribing the method of letting contracts and the contractor therefore cannot recover from the city upon the contract even though he has performed the work and the city has had the benefit of it. *Hart v. City of New York*, 201 N. Y. 45, mod'g 139 App. Div. 901, 123 N. Y. Supp. 1119.

A prospective bidder is justified in basing his bid upon plans and justifications shown him by the officer to whom he was referred by the advertised proposals for such information at least in the absence of any intimation that there were other and more detailed plans in existence. *Beckwith v. City of New York*, 133 N. Y. Supp. 203.

A provision of the advertised proposals for a pumping engine requiring the successful bidder to give satisfactory evidence that he has built the type of engine required and is able to complete the work as specified, *held*, to be for the benefit of the city and not for the benefit of other bidders and not to bind the city to reject the bid because the bidder has not fully complied with the provisions. *Nathan v. O'Brien*, 117 App. Div. 664, 102 N. Y. Supp. 947.

Where the proposals for a disposal plan to be constructed in connection with a sewer allowed the bidder to select any method of sewage disposal according to any system he desired and prescribed no plans or specifications to be submitted with the bid, *held*, that the proposals were insufficient, and the contract was invalid. The fact that there were various standard systems of sewage disposal involving such radically divergent theories that bids for installing the same could not be based on a common set of specifications of substantial features, did not authorize the city to submit proposals to the bidder allowing him to select whichever system he preferred. It was

the duty of the city either to adopt what seemed the most promising system and make proper specifications for work and materials or else assuming that such a cause was permissible to call for bids on any one of the different systems, and plans and specifications should have been prepared and applicable to each system upon which bids were to be received. *Hart v. City of New York*, 201 N. Y. 45, mod'g, 139 App. Div. 901, 123 N. Y. Supp. 1119.

See cases cited under § 1554, *post*, for rules regulating the awarding of contracts for patented pavements, etc.

Bids and awards.

The power to prescribe the formal characteristics of a bid is vested by this section in the board of aldermen, and the head of a department has no power to adopt a resolution adding further requirements respecting the form in which a bid should be presented and invalidating the bid unless it complies with such requirement: so *held*, holding that the head of a department had no power to adopt a resolution requiring that a bid by a corporation should be signed in the name of such corporation by some duly authorized officer or agent thereof, who shall subscribe his own name and office, and that the rejection of a bid upon the ground of non-compliance with such regulation was unauthorized and rendered invalid the award of the contract to the next lowest bidder. *Daly v. O'Brien*, 60 Misc. 423, 112 N. Y. Supp. 304.

The announcement by the head of a department on the opening of bids that a certain party is the lowest bidder does not constitute an award of the contract to him or prevent the head of the department from rejecting all the bids. *Williams v. City of New York*, 118 App. Div. 756, 104 N. Y. Supp. 14, *aff'd* 192 N. Y. 541.

The head of a department has no power to reject all bids and readvertise the contract after he has notified the lowest bidder that the contract has been awarded to him. *Lynch v. City of New York*, 2 App. Div. 213, 37 N. Y. Supp. 798; *Pennell v. The Mayor*, 17 App. Div. 455, 45 N. Y. Supp. 229; *Beckwith v. City of New York*, 121 App. Div. 462, 106 N. Y. Supp. 175.

Where the head of a department after the notice of the award of a contract to the lowest bidder rejected all bids and readvertised the contract, *held*, that the lowest bidder by accepting the return of the deposit made by him with the bid did not waive his right to insist upon the performance of the obligation assumed by the city under the contract. *Lynch v. City of New York*, 2 App. Div. 213, 37 N. Y. Supp. 798.

After the award of a contract to the lowest bidder the head of the department has no power to rescind the contract and reject all bids on the ground that the comptroller has not certified that there is a fund applicable to payment as required by § 149, *ante*, if in fact such fund exists and the certificate was not issued merely because the contract was never presented to the comptroller for certification. *Beckwith v. City of New York*, 121 App. Div. 462, 106 N. Y. Supp. 175.

The head of a department is without power to award a contract, where all the bids are in excess of the amount appropriated for the work. It is the duty of a head of the department under such circumstances to reject all bids. The acceptance by the head of the department of the lowest bid in such a case subject to the approval of the board of estimate and the board of aldermen of an additional appropriation, confers no rights upon the lowest bidder. Such bid being invalid when made, cannot be given validity by any subsequent action on the part of the head of the department or any other municipal board. *Williams v. City of New York*, 118 App. Div. 756, 104 N. Y. Supp. 14, aff'd 192 N. Y. 541.

The act of municipal officers in awarding the contract for a street improvement to one who was not the lowest bidder and rejecting the lowest bid, in violation of the provisions of the city charter, will not confer a right of action upon the person making the lowest bid to recover his damages against the city resulting from his loss of the contract. In such case, there is no contractual relation which will sustain the action, and as the statute was not enacted for the benefit of the bidder he cannot recover by virtue of its provisions. It seems that the remedy of the plaintiff is by mandamus to compel the execution of a contract in accordance with the statute. *Molly v. City of New Rochelle*, 192 N. Y. 402, aff'g 123 App. Div. 642, 108 N. Y. Supp. 120.

Permission to substitute materials.

This section prohibits the city officials from entering into agreements with a contractor, permitting him to substitute other material for that specified in the contract. Such an agreement constitutes a new contract which can only be let in conformity to the provisions of this section. Accordingly, where a contractor had been awarded a contract to lay asphalt block pavement, and the pavement so laid, turned out to be defective, and the balance of the contract price amounting to over \$1,000 had been withheld by the city authorities, *held*, that the city authorities had no power to enter into an agreement with the said contractor authorizing him to repave the street with sheet asphalt for the amount of the balance which would have been payable under the original contract, and a taxpayer's action will lie to restrain the comptroller from paying for the same on the ground that the contract had not been let in conformity to the provisions of this section. Also *held* that the agreement cannot be upheld on the theory that it was made by the comptroller under § 149, *ante*, in settlement of a suit brought by the contractor against the city to recover the balance on the original contract. *Cahn v. Mets*, 115 App. Div. 516, 101 N. Y. Supp. 392.

Extra work.

Where additional work is required for the completion of a contract already awarded, and the expense thereof does not exceed five per centum of the amount of the original contract, such extra work may be ordered by the head of the department without public letting, even if the amount of the extra

work exceeds the sum of \$1,000, provided it be not more than five per centum of the amount of such original contract. *Dady v. City of New York*, 65 Misc. 382, 121 N. Y. Supp. 860.

Where extra work ordered by the head of the department without public letting was not necessary for the completion of the original contract, *held* that the contractor could not recover therefor, although the work had been performed and the city had the benefit of it. *Dady v. City of New York*, 65 Misc. 382, 121 N. Y. Supp. 860.

Where a municipal representative, without collusion and against the contractor's opposition, requires the latter to do something as covered by his contract, and the question whether the thing required is embraced within the contract is fairly debatable, and its determination surrounded by doubt, the contractor may comply with the demand under protest and subsequently recover damages, even if it turns out that he was right and that the thing was not covered by his contract. *Beckwith v. City of New York*, 133 N. Y. Supp. 202.

Completion of work by surety.

Where the board of aldermen pursuant to the provisions of this section, authorized the making of a supplementary contract for extra work with the original contractor and before the execution of the supplementary contract, the original contract was repudiated by the city upon the ground of unreasonable delay, *held*, that the surety of the contractor completing the work upon demand of the city could recover under the contract and the fact that there was no appropriation for the cost of the work when the supplementary contract was made, did not defeat the surety's right to recover, where all the requirements in that respect were complied with before the work was actually completed. *O'Rourke E. Const. Co. v. City of New York*, 140 App. Div. 498, 125 N. Y. Supp. 664.

Contracts not required to be let upon public bidding.

The provisions of this section do not apply to work or materials furnished to meet an emergency creating an immediate necessity for the said work, or materials. Facts examined and *held*, not to constitute an emergency which relieved a contractor from showing that the provisions of this section prescribing the manner of letting contracts had been complied with. *Dady v. City of New York*, 65 Misc. 382, 121 N. Y. Supp. 860.

The provisions of this section requiring contracts to be let upon competitive bidding have no application to contracts for services involving the exercise of scientific knowledge and skill. So *held*, holding that an architect employed by the city upon an oral contract could recover for services rendered to the city, although the contract for his employment was not made upon competitive bids. *Horgan & Slattery v. City of New York*, No. 1, 114 App. Div. 555, 100 N. Y. Supp. 68, followed in *Schieffelin v. City of New York*, 65 Misc. 609, 122 N. Y. Supp. 502.

Contracts for less than \$1,000.

Under the provisions of § 149, *ante*, when read in connection with this section, a contract made by a department without public letting, for the performance of work for a fixed sum, is legally equivalent to an agreement to pay *quantum meruit*. If the auditor thinks the work worth less than the contract price "the plaintiff must establish his claim by competent evidence of value." The contract price does not give the plaintiff a favorable presumption, nor can it even be used as evidence tending to support his cause, for "no testimony shall be admitted to show a promise . . . to pay any larger sum than the amount as audited or allowed by the department of finance." If the sum named in the contract can be proved at all, it can only be, as would seem from the language of the charter, by the city in defense as putting a maximum limit upon the *quantum meruit*. *Smith Contracting Co. v. City of New York*, 70 Misc. 132, 128 N. Y. Supp. 351, *aff'd* 146 App. Div. 760, 131 N. Y. Supp. 479.

A contractor with the city cannot recover for work amounting to less than \$1,000 which was performed without a certificate of the necessity of the expenditure therefor by the head of the department. A mere verbal order of the head of the department *held*, not equivalent to the formal certificate required by this section. *Dady v. City of New York*, 65 Misc. 382, 121 N. Y. Supp. 860.

Where the commissioner of public works purporting to act for the president of the borough, signed a certificate of the necessity for an expenditure it will be presumed that he acted conformably to the power conferred upon him by § 383, *ante*, and the burden of showing that he was not authorized to act for the president of the borough rests upon the party asserting the same. *Culp v. City of New York*, 146 App. Div. 326, 130 N. Y. Supp. 705.

Violation of statute.

Where a contract was awarded to the lowest bidder and was based upon proposals for the construction of a sewer and sewage disposal plan containing separate plans and specifications for each job and required separate bids to be made on each job, *held*, that the contract was so far divisible and severable that the contractor could recover against the city for the construction of the sewer, although the proceedings authorizing the disposal plan were invalid. *Uvalde Asphalt Paving Co. v. City of New York*, 128 App. Div. 210, 112 N. Y. Supp. 535, *aff'd* 198 N. Y. 548.

Clauses required to be inserted by Labor Law.

Section 3 of the Labor Law, as amended by L. 1906, ch. 506, providing that there be inserted in all municipal contracts a clause that workmen employed by municipal contractors shall not be permitted or required to work more than eight hours a day and prohibiting payments to the contractor violating the statute, is constitutional and valid. *People ex rel. W. E. & C. Co. v. Metz*, 193 N. Y. 148, *rev'g* 126 App. Div. 912, 110 Supp. 1141.

A contractor with the city for the construction of a municipal building under a contract which in pursuance of § 3 of the Labor Law, provides for an eight-hour day and the payment of the prevailing rate of wages held not to prevent the contractor from having work called for by the contract, done in another state, where no such law exists and where neither of said provisions observed. *Ewen v. Thompson-Starrett Co.*, 71 Misc. 171, 128 N. Y. Supp. 595.

A contractor with the city for the construction of a municipal building under a contract, which conformably to § 3 of the Labor Law, provides for an eight-hour day and the payment of the prevailing rate of wages, held, not to have forfeited the payments due thereunder by contracting for the manufacture of doors, windows, and other manufactured woodwork for the building with one who in doing the work employs his men more than eight hours a day and pays them less than the prevailing rate of wages, since such manufacturer is not a subcontractor or other person doing or contracting to do the whole or a part of the work within the meaning of the Labor Law. *Bohnen v. Metz*, 126 App. Div. 807, 111 N. Y. Supp. 196, *aff'd* 193 N. Y. 6.

§ 421. Certificate of completion to be filed. (See 3d Ed., 318.)

A certificate of the completion and acceptance of work filed by the head of the department with the comptroller pursuant to this section becomes a public record and the head of the department has no power to remove the certificate from the files and substitute another certificate in its place. Mandamus will lie upon the application of the contractor to compel the return of the certificate to the office of the comptroller. *People ex rel. Thomas Leahy Bldg. Co. v. Prendergast, Bischoff, J.*, N. Y. Law Jour., December 29, 1910.

The certificate of the completion and acceptance of work filed by the head of the department pursuant to this section does not conclusively establish the amount due the contractor and mandamus will not lie to compel the comptroller to pay the amount stated in the certificate where its correctness is contested upon the ground that a claim of the city for damages on account of delay in the work had been overlooked or mistakenly omitted. The contractor's remedy in such a case is by action against the city. *People ex rel. Thomas B. Leahy Bldg. Co. v. Prendergast, Bischoff, J.*, N. Y. Law Jour., December 29th, 1910.

Districts for home rule and local improvements. (See 3d Ed., p. 320.)

§ 425. For the purposes of home rule and local improvements the territory of the city of New York is hereby divided into two parts, to-wit: the city of New York and the county of Richmond, and shall be called Staten Island.

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Proposals for work or supplies to be advertised; deposit to accompany bid.

§ 420. Whenever proposals for furnishing supplies or doing work are invited by advertisement by any department or officer, such department or officer is authorized and directed to require, as a condition precedent to the reception or consideration of any proposal, the deposit with such department or officer of a certified check upon one of the state or national banks of the said city, drawn to the order of the comptroller, or of money or of corporate stock or certificates of indebtedness of any nature, issued by the city of New York, which the comptroller shall approve as of equal value with the security required; such checks or money or corporate stock or certificates of indebtedness to accompany the proposal, to an amount not less than three nor more than five per centum of the amount of the bond required by the department or officer for the faithful performance of the work proposed to be done or supplies to be furnished. Within ten days after the opening of bids, the comptroller shall return all the deposits made to the persons making the same, except the deposits made by the lowest three bidders; within three days after the decision as to whom the contract is to be awarded, the comptroller shall return the deposits to the remaining persons making the same, except the deposit made by the bidder whose bid has been accepted, and if the said bidder whose bid has been accepted shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, or to furnish the required bond, the amount of deposit made by him shall be forfeited to and retained by the said city as liquidated damages for such neglect or refusal, and shall be paid into the sinking fund of the city, but if the said bidder shall execute the contract and furnish the required bond within the time aforesaid, the amount of his deposit shall be returned to him. (As

Comptroller to pay contractors.

§ 422. When a contract for a public improvement shall have been entered into and a certified copy thereof shall have been filed with the comptroller, in conformity with section four hundred and nineteen of this act, said comptroller is hereby authorized and directed to pay to the contractor or his assigns, from time to time as the work progresses, eighty-five per centum of the estimated value of the work

tract, provided, however, that the board of aldermen, upon the rec-

second district shall consist of the sixty-sixth, sixty-seventh and sixty-eighth aldermanic districts of the city of New York as constituted by this act, being part of the county of Queens, and shall be called Newtown; the third district shall consist of the sixty-ninth and seventieth aldermanic districts of the city of New York, being part of the county of Queens, and shall be called Jamaica; the fourth district shall consist of the territory comprised in the forty-second, forty-third and forty-fourth aldermanic districts of the city of New York as constituted by this act, being part of the county of Kings, and shall be called The Heights.

The fifth district shall consist of the territory comprised in the forty-fifth, forty-sixth and forty-seventh aldermanic districts of the city of New York and shall be called Bedford.

The sixth district shall consist of the territory comprised in the forty-eighth, forty-ninth and fiftieth aldermanic districts of the city of New York, and shall be called Bay Ridge.

The seventh district shall consist of the territory comprised in the fifty-first, fifty-second and fifty-third aldermanic districts of the city of New York, and shall be called Prospect Heights.

The eighth district shall consist of the territory comprised in the fifty-fourth, fifty-fifth and fifty-sixth aldermanic districts of the city of New York, and shall be called Williamsburgh.

The ninth district shall consist of the territory comprised in the fifty-seventh, fifty-eighth and fifty-ninth aldermanic districts of the city of New York, and shall be called Flatbush.

The tenth district shall consist of the territory comprised in the sixtieth, sixty-first and sixty-second aldermanic districts of the city of New York, and shall be called Bushwick.

The eleventh district shall consist of the territory comprised in the sixty-third, sixty-fourth and sixty-fifth aldermanic districts of the city of New York, and shall be called New Lots.

The twelfth district shall consist of the territory comprised in the second, fourth and eighth aldermanic districts of the city of New York, and shall be called Corlear's Hook.

The thirteenth district shall consist of the territory comprised in the third, sixth and tenth aldermanic districts of the city of New York and shall be called the Bowery.

The fourteenth district shall consist of the territory comprised in the first, fifth and seventh aldermanic districts of the city of New York and shall be called Greenwich.

The fifteenth district shall consist of the territory comprised in the twelfth, fourteenth and sixteenth aldermanic districts of the city of New York and shall be called Kip's Bay.

The sixteenth district shall consist of the territory comprised in the ninth, eleventh and thirteenth aldermanic districts and shall be called Hudson.

The seventeenth district shall consist of the territory comprised in the eighteenth, twentieth and twenty-second aldermanic districts of the city of New York and shall be called Yorkville.

The eighteenth district shall consist of the territory comprised in the twenty-sixth, twenty-eighth and thirtieth aldermanic districts of the city of New York and shall be called Murray Hill.

The nineteenth district shall consist of the territory comprised in the fifteenth, seventeenth and nineteenth aldermanic districts of the city of New York and shall be called Riverside.

The twentieth district shall consist of the territory comprised in the twenty-first, twenty-third, twenty-fourth and thirty-third aldermanic districts of the city of New York and shall be called Washington Heights.

The twenty-first district shall consist of the territory comprised in the twenty-fifth, twenty-seventh, twenty-ninth, thirty-first and thirty-second aldermanic districts of the city of New York and shall be called Harlem.

The twenty-second district shall consist of the territory comprised in the thirty-fourth aldermanic district of the city of New York and shall be called Morrisania.

The twenty-third district shall consist of the territory comprised in the thirty-fifth and thirty-sixth aldermanic districts of the city of New York and shall be called Chester.

The twenty-fourth district shall consist of the territory comprised in the thirty-seventh and thirty-eighth aldermanic districts of the city of New York and shall be called Crotona.

The twenty-fifth district shall consist of the territory comprised within the thirty-ninth, fortieth and forty-first aldermanic districts of the city of New York and shall be called Van Courtlandt. (*As amended by L. 1907, ch. 763.*)

§ 428. The local board; powers. (See 3d Ed., p. 322.)

This section was not intended to confer upon the local boards the exclusive power to initiate proceedings for the purposes therein enumerated. The section merely authorizes the local boards to deal with applications for local improvements where the same have been instituted by petition to the president of the borough. Notwithstanding the provision of this section, the board of estimate and apportionment with the consent of the mayor has power of its own volition to initiate and carry through such public improvements as it deems for the best interest of the city at large, irrespective of any action

or lack of action by the local boards. *Reis v. City of New York*, 188 N. Y. 58, aff'g 113 App. Div. 464, 99 N. Y. Supp. 291.

Power of local boards of public improvements extended.

(See 3d Ed., p. 325.)

§ 435. A local board shall have the power to cause the flagging or reflagging, the curbing or recurbing of sidewalks, laying or relaying of crosswalks, constructing of gutters, receiving basins and inlets, fencing vacant lots, digging down lots or filling in sunken lots within its district, by resolution approved by the board of estimate and apportionment; provided, however, that when the expenses to be incurred by any one such resolution shall not exceed the sum of two thousand dollars, the approval of the board of estimate and apportionment shall not be necessary. When such public work or improvement shall have been authorized, the president of the borough within which such work is to be done shall proceed forthwith in the execution thereof. (*As amended by L. 1911, ch. 712.*)

Power to assess for local improvements. (See 3d Ed., p. 325.)

§ 436. In all cases where the board of estimate and apportionment or the board of aldermen or the board of estimate and apportionment and the board of aldermen together, with or without the concurrence or approval of any other board or officer, are authorized to determine that a local improvement is to be made, the said board of estimate and apportionment or the said board of aldermen, or both, as the case may be, shall determine whether any, and if any, what proportion of the cost and expense thereof shall be borne and paid by The City of New York, and the remainder of such cost and expense shall be assessed upon the property deemed to be benefited thereby; and the assessment shall be laid and confirmed and collected in accordance with the provisions of chapter seventeen of this act. The determination or decision of such board as to the proportion of cost and expense to be borne and paid by The City of New York, and as to the proportion to be borne by the property benefited, after it shall have been made and announced, shall be final, and such determination or decision shall not be reopened or reconsidered by said board. Except that the board of estimate and apportionment as provided in this section, may in its discretion, upon the petition of a majority of property owners whose property has been assessed because deemed to be benefited by such local improvement, as herein provided within six months after such assessment has been imposed reopen and reconsider its said determination and decision and may re-determine the

proportion of such expense to be borne by The City of New York and by the property benefited as hereinbefore provided in this section. The words "local improvement" as used in this section shall be construed to mean any work the payment of which was, prior to the passage of this act, provided for, by the laws in force in the territory of the corporation formerly known as the mayor, aldermen and commonalty of The City of New York, in whole or in part, by assessment upon the property deemed to be benefited thereby or the owners thereof, other than assessments which are confirmed by a court of record. (*As amended by L. 1907, ch. 678.*)

Map to be completed. (See 3d Ed., p. 328.)

§ 439. It shall be the duty of the president of each borough comprised within The City of New York, as constituted by this act, subject to the limitations hereinafter provided, to prepare a map of that part of the territory embraced within the borough of which he is president, of which a map or plan has not heretofore been finally established and adopted, as set forth in section four hundred and thirty-eight of this act, locating and laying out all parks, streets, bridges, tunnels and approaches to bridges and tunnels, and indicating the width and grades of all such streets so located and laid out. It shall be the duty of the president of each borough under the direction of the mayor to continue and complete the system of exact triangulation inaugurated in the borough of The Bronx, over that part of the borough of which he shall be president, of which no map or plan has heretofore been established and approved, provided that such system of triangulation, after the most approved and exact method, shall be finished before the first day of January, nineteen hundred and seven. The duty of conducting such system of triangulation shall be entrusted only to a civil engineer who shall have had at least five years' experience in the method and manner of precise surveying, and whose fitness and competency shall have been determined in a civil service examination, or, with the consent of the mayor, to such civil engineer or other expert as may be designated by the superintendent of the United States coast and geodetic survey, or other proper officer of the United States. The mayor with the approval of the board of estimate and apportionment shall have power to enter into a contract or agreement with the proper representative of the United States so that The City of New York may be able to avail itself of the aid and assistance of the United States coast and geodetic survey in making an exact triangulation of the territory embraced within the boundaries of The City of New York. The mayor with the approval of the board

of estimate and apportionment shall have power to employ such persons to assist in the work as they may deem necessary and to pay such sums as may be reasonable and necessary for their services and subsistence and for reasonable and necessary expenses, but not to exceed the sum of fifteen thousand dollars in any one year. The comptroller is authorized and directed to issue special revenue bonds not to exceed said amount in any one year upon the request of the board of estimate and apportionment in order to provide the means to make the payments thus authorized. The said civil engineer or other expert shall prepare and furnish, for primary stations, the latitude and longitude determined in conformity with the method used by the United States coast and geodetic survey; for secondary stations, the rectangular spherical co-ordinates; and for all stations, rectangular co-ordinates referred to a given fixed central meridian, or assumed meridian. Such co-ordinates shall be official and binding upon all officers making any map or plan relating to any borough or part thereof. Whenever and as often as the president of any borough shall have completed the map of a part of the territory aforesaid, he shall report the same together with the surveys, maps and profiles, showing the parks, streets, bridges, tunnels, and approaches to bridges and tunnels located and laid out by him, and the grades thereof, to the board of estimate and apportionment for its concurrence and approval, subject, nevertheless, to such corrections or modifications as in the judgment of the majority of said board may be advisable; and the said board thereafter shall cause such map or plan, and such profiles, as finally adopted by it, to be certified by the secretary of said board, and filed as follows: One copy thereof in the office in which conveyances of real estate are required to be recorded in the county in which the territory shown upon such map is located; one copy thereof in the office of the corporation counsel, and one copy thereof in the office of the president of the borough, who shall have prepared such map. Such map and profiles, when so adopted and filed, shall become a part of the map or plan of The City of New York, and shall be deemed to be final and conclusive with respect to the location, width and grades of the streets shown thereon, and the same shall not be subject to any further change or modification except as provided in section four hundred and forty-two of this act; provided, however, that local boards at a joint meeting of all the boards comprised within the borough for which said map was adopted, within three months after the opening of a street, shall have the power to alter the grade of such street, and to alter the grades of intersecting streets, so far as it may be necessary to conform the same to new grades of the street opened. (*As amended by L. 1911, ch. 675.*)

§ 442. Authority of board of estimate to change map or plan of city or to change grades. (See 3d Ed., p. 330.)

Maps.

The presumption arising from the production of a map from the public offices where it was legally required to be filed, is that all statutory provisions necessary to the legality of its filing had been previously complied with. *Sp. T., Greenbaum, J., Matter of Acquiring Title to Tremont Ave. (177th St.)* N. Y. Law Jour., March 13th, 1911.

Closing streets.

The legislature has power to confer upon the board of estimate and apportionment the authority to close and discontinue streets. *Reis v. City of New York*, 188 N. Y. 58, aff'g 113 App. Div. 464, 99 N. Y. Supp. 291; *People ex rel. Winthrop v. Delany*, 120 App. Div. 801, 105 N. Y. Supp. 746, aff'd 192 N. Y. 533.

Providing that the board of estimate and apportionment exercise its legislative powers for the purpose of a public use, its action cannot be questioned or reviewed, and the power given it to alter the city map so as to close streets, cannot be criticised. *Matter of City of New York (Boston Road)*, 142 App. Div. 726, 127 N. Y. Supp. 637.

The board of estimate and apportionment under this section has the undoubted power to initiate proceedings for the closing of a street irrespective of any action or lack of action on the part of the local board of the district within which the street is located. Proceedings for the closing of streets are not irregular or invalid because they originate with the board of estimate and apportionment instead of the local boards of the districts within which such streets are located. *Reis v. City of New York*, 188 N. Y. 58, aff'g 113 App. Div. 464, 99 N. Y. Supp. 291.

Where proceedings were taken under L. 1895, ch. 1006, to close a part of a street and commissioners have reported damages to an abutting owner, the board of estimate and apportionment cannot under this section to the detriment of the owner, re-establish and re-locate the part of the street closed and discontinue the proceedings first mentioned as to that part of the street thus sought to be re-established. *Matter of City of New York (W. 151st St.)*, 132 App. Div. 867, 117 N. Y. Supp. 841.

The power of the city acting through the board of estimate to close streets under this section, is not affected or impaired by the provision of § 990, *post*, which declares that the title to land acquired by the city for street purposes shall be held in trust "that the same be appropriated or kept open for a public street forever." The legislature has the power to free the city of this trust by legislation authorizing the closing of streets. *Reis v. City of New York*, 113 App. Div. 464, 99 N. Y. Supp. 291, aff'd 188 N. Y. 58.

The city acting through the board of estimate under this section is empowered to close streets without compensating the owners of property al-

though direct access to their lands has been cut off, provided other means of access to their property remains. The fact that the closing of a street makes it necessary for the owner of lands to make a detour of several blocks in order to reach his property, does not entitle him to compensation. *Reis v. City of New York*, 113 App. Div. 464, 99 N. Y. Supp. 291, *aff'd* 188 N. Y. 58.

Where lots composing a tract are conveyed by a common grantor with reference to a map upon which a street is laid down, the grantee of a lot acquires a private easement in such street for the purpose of access which is a property right, of which he cannot be deprived without compensation. The private easement thus acquired, however, does not extend to every block composing such street as shown upon the map, but terminates on reaching the next intersecting cross street or avenue on each side of the block of said street upon which the grantee's property abuts. The grantee is entitled to have that block upon which his lot abuts kept open, and likewise is entitled to have the ends of the block upon which his property abuts kept open where it is crossed by or comes into the intersecting street or avenue. The abutting owner, however, suffers no damage or injury by reason of the action of the city in closing a block of such street on the further side of an intersecting street or avenue crossing the ends of the block upon which his property abuts. *Reis v. City of New York*, 188 N. Y. 58, *aff'g* 113 App. Div. 464, 99 N. Y. Supp. 291.

Drainage plan to be filed. (See 3d Ed., p. 332.)

§ 445. Upon the completion of the map or plan for the drainage of any sewerage district and its approval by the board of estimate and apportionment, such map or plan shall be the permanent plan for the sewerage of such district; subject, however, to such subsequent modifications, as may in the opinion of the president of the borough to which said plan shall apply, and the board of estimate and apportionment, become necessary in consequence of alterations made in the location or grade of any street or part thereof in said district, or for other reasons. Copies of such complete map or plan and of the maps showing modifications therein shall be certified by the secretary of the board of estimate and apportionment and shall be filed as follows: One copy thereof in the office in which conveyances of real estate are required to be recorded in the county in which the territory shown upon said map is located; one copy thereof in the office of the corporation counsel, and one copy thereof in the office of the president of the borough to which said plan applies. (*As amended by L. 1911, ch. 675.*)

Department of street cleaning; chief engineers. (See 3d Ed., p. 336.)

§ 453. The commissioner at the head of each of said departments,

excepting the department of street cleaning, may appoint and at pleasure remove a chief engineer of his department, with power to appoint, remove and detail a staff of assistant engineers. If the commissioner of any department deem it advisable that more than one chief engineer be appointed for such department, such commissioner, when authorized by the board of estimate and apportionment and the board of aldermen, may appoint such additional chief engineers, each with power to appoint and remove at pleasure, and detail a staff of assistant engineers. All chief engineers appointed by them respectively, must be civil engineers of at least ten years' experience, and all assistant engineers appointed by them must be civil engineers of at least five years' experience. An engineer located at a branch office of his department in any borough may be appointed a deputy commissioner for the borough or boroughs to which he is assigned. An assistant engineer who has been appointed a deputy commissioner may be designated as the engineer for the borough in which he acts as deputy. Any engineer may be designated by such title as shall properly describe his principal duties in the judgment of the head of his department. (*As amended by L. 1908, ch. 83.*)

§ 455. Consulting engineers. (See 3d Ed., p. 337.)

This section does not confer authority upon the commissioner of bridges to appoint a consulting engineer to furnish plans and specifications for the public drive extending Riverside Drive under L. 1897, ch. 665, and superintend the work for a compensation based upon a percentage of the cost, the board of estimate and apportionment not having approved such plans and specifications. *Hildreth v. City of New York*, 138 App. Div. 103, 122 N. Y. Supp. 1053; *Same v. Same*, 111 App. Div. 63, 97 N. Y. Supp. 582.

§ 469. Commissioner of water supply, gas and electricity; jurisdiction. (See 3d Ed., p. 340.)

Whatever may be the power of the commissioner of water supply with respect to the lighting of public buildings it does not extend to the lighting of the public schools of the city. The management and control of public schools is vested exclusively in the Board of Education by § 1055 of the charter. *The United Electric Light & Power Co. v. Board of Education*, MacLean, J., Sp. T., N. Y. Law Jour., May 18th, 1909.

§ 471. Commissioner of water supply, gas and electricity; restriction on power to contract. (See 3d Ed., p. 341.)

Contracts with water supply companies.

The words "touching or concerning the public water supply" in this sec-

tion making it unlawful for the city or any department to make any contract with any person or corporation supplying or selling water, do not apply to a case where in the absence of "public water supply," the city takes water from a private corporation required to furnish the same by Transportation Corporations Law (L. 1909, ch. 63, sec. 81) for the city's public building, stables, park, sprinkling streets, etc. *Staten Island Water Supply Co. v. City of New York*, 144 App. Div. 319, 128 N. Y. Supp. 1028.

Employees of water works companies, operation of which assumed by city. (New.)

§ 471a. Each and every superintendent, cashier, bookkeeper, stenographer, clerk, inspector, tapper, calker, pipe fitter, engineer, assistant engineer, street foreman, fireman, driver and stableman, who on the first day of January, nineteen hundred and eight, was employed as such by any water works company, the operation of which shall, hereafter, be assumed by The City of New York, and who shall continue to be so employed at the time when the operation of said water works shall be assumed by The City of New York, and who shall successfully pass a non-competitive civil service examination, under the civil service law, in accordance with rules and regulations prepared by the municipal civil service commission, shall, after The City of New York shall have assumed the operation of said water works, have their names placed upon appropriate lists for employment thereon for the same or similar service in the department of water supply, gas and electricity of such city, as they performed on the first day of January, nineteen hundred and eight. For appointments under the provisions of this act, the municipal civil service commission shall make certifications from such lists before certifications are made from any other lists, and the commissioner of water supply, gas and electricity shall in his discretion have authority to make appointments from the lists provided for herein under the same rules and regulations of the municipal civil service commission of The City of New York as govern appointments from the regular municipal civil service eligible lists. (*Added by L. 1908, ch. 142.*)

Board of aldermen; power to fix water rents. (See 3d Ed., p. 344.)

§ 473. The board of aldermen shall hereafter have all power, on recommendation of the commissioner of water supply, gas and electricity, to fix and to establish a uniform scale of rents and charges for supplying water by The City of New York, which shall be apportioned to different classes of buildings in said city in reference to their dimensions, value, exposures to fires, ordinary use for dwellings, stores,

shops, private stables and other common purposes, number of families or occupants, or consumption of water, as near as may be practicable, and modify, alter, amend and increase such scale from time to time, and to extend it to other descriptions of buildings and establishments. All extra charges for water shall be deemed to be included in the regular rents, which shall become a charge and lien upon the buildings upon which they are respectively imposed, and if not paid, shall be returned as arrears to the collector of assessments and arrears. Such regular rents, including the extra charges above mentioned, shall be collected from the owners or occupants of all such buildings, respectively, which shall be situated upon lots adjoining any street or avenue in said city in which the distributing water pipes are or may be laid, and from which they can be supplied with water. Said rents, including the extra charges aforesaid, shall become a charge and lien upon such houses and lots, respectively, as herein provided, but no charge whatever shall be made against any building in which a water meter may have been or shall be placed as provided in this act. In all such cases in which a water meter may have been or shall be placed in any building as provided in this act, except as hereinafter provided, the charge for water shall be determined only by the quantity of water actually used as shown by said meters, except as otherwise provided by section four hundred and seventy-five of this act. (*As amended by L. 1908, ch. 382, § 1.*)

Regulations of commission respecting use of water.

The commissioner of water supply has the power to make reasonable regulations to secure the collection of the revenues and proper use of the mains and appliances for distribution of water and to prevent an undue waste thereof, and his discretion in this respect will not be interfered with by the court except a clear abuse of discretion is shown. *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216.

Regulations permitting the use of a hose, rams, engines, siphons and other appliances only where premises are metered and requiring water pipes to be kept in repair by those using water are reasonable. *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216.

Water rates.

The payment by a consumer of the water rent for the current year does not create an absolute contract on the part of the city to furnish water for the year at that rate since by the express terms of the statute, the commissioner of water supply is authorized in his discretion to change the rate. Accordingly the commissioner has the power to direct the installation of a water meter, although the consumer has paid the water rent upon the premises for the year. *Swanberg v. City of New York*, 123 App. Div. 774, 108 N. Y. Supp. 364.

The board of alderman under this section and § 475, *post*, being given the power to establish water rates, they may not after fixing the rate on certain classes of buildings, delegate the power to the commissioner of water supply, gas and electricity to fix the rate on other buildings by special contract with him; and a temporary injunction will be granted to the owner of an apartment house for which water rates have not been fixed by the board of aldermen restraining the commissioner of water supply, gas and electricity from cutting off the water supply. *Johnson-Kahn Co. v. Thompson*, 68 Misc. 639, 125 N. Y. Supp. 443. See also cases cited under § 475, *post*.

The ordinance of the board of aldermen fixing the scale of minimum annual charges for water supply to dwelling houses based on a frontage width up to fifty feet and a height up to and including five stories, not applying to apartment houses over five stories in height, the owner of an apartment house over five stories in height is not entitled to a mandamus compelling the commissioner of water supply, gas and electricity to furnish water at frontage rates, where it appears that a meter was installed without objection and that for over five years the owner and his predecessors in title paid for water according to the meter readings without objection. *Matter of Herrmann*, 138 App. Div. 780, 123 N. Y. Supp. 752. To same effect see *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216.

Water rents, when a lien.

Water rents do not become a lien, until the amount thereof is ascertained and determined and an actual entry made in the proper book. *Mandel v. Weschler*, 128 App. Div. 505, 112 N. Y. Supp. 813, *aff'd* 198 N. Y. 518.

Water rents are not a lien on new buildings until an application for water has been made and a permit issued under City Ordinances, § 283, providing that all rents for use of water shall be paid in advance at the time of applying for water and before permit is issued, to be calculated up to the 1st day of May succeeding. *Mandel v. Weschler*, 128 App. Div. 505, 112 N. Y. Supp. 813, *aff'd* 198 N. Y. 518.

Where an owner of real property relying upon the representation of the city authorities and the public records that a lien upon the premises for water consumed by a tenant had been paid, released a third party who was a surety for the payment of water rates by the tenant, *held*, that the city could not thereafter on discovering that the water rates had not in fact been fully paid, assert a lien upon the property for the amount unpaid. *Rankin v. City of New York*, 145 App. Div. 838, 130 N. Y. Supp. 427.

Exemption from payment of water rents.

By Laws 1906, ch. 440, hospitals, dispensaries, orphan asylums, homes for the aged, houses or homes for the reformation, protection or shelter of females, day nurseries or corporations or societies for the care and instruction of poor babies and needy children, and industrial homes, and any benevolent or charitable corporation owning or maintaining public baths, for free school societies

or free circulating libraries or veteran firemen's associations and any social settlement, whether incorporated or unincorporated, which shall own or lease for a term not less than three years, a building or buildings devoted exclusively to the purposes of such social settlement, now existing or hereafter established in The City of New York, are exempted from assessment for water supplied to them by the city.

The provision of L. 1906, ch. 440 exempting real estate used solely for the purposes of a veteran firemen's association from the payment of water rates is not in violation of the provision of the state constitution forbidding municipalities from giving money or loaning credit in aid of individuals or corporations. *People ex rel. Veteran Volunteer Firemen of Brooklyn v. Metz*, 120 App. Div. 565, 104 N. Y. Supp. 1115.

Water meters; when to be placed. (See 3d Ed., p. 347.)

§ 475. The commissioner of water supply, gas and electricity is authorized, in his discretion, to cause water meters, the pattern and price of which shall be approved by the board of aldermen, to be placed in all stores, workshops, hotels, manufactories, office buildings, public edifices, at wharves, ferry-houses, stables, and in all places in which water is furnished for business consumption, and, if authorized thereto by resolution or ordinance of the board of aldermen, in all apartment-houses, tenements, flathouses, and private dwellings, so that all water so furnished therein or thereat may be measured and known by the said department, and for the purpose of ascertaining the ratable portion which consumers of water should pay for the water therein or thereat received and used. Thereafter, as shall be determined by the commissioner of water supply, the said department shall make out all bills and charges for water furnished by them to each and every consumer as aforesaid, to whose consumption a meter as aforesaid is affixed in ratable proportion to the water consumed, as ascertained by the meter, except that when by any cause or reason the meter shall fail to register correctly, or shall by any defect cease to record the water passing through it, or where said meter shall have been removed from a building for repairs, or for any other reason, then the commissioner of water supply, gas and electricity shall be authorized to charge for the water between the interruption of the registry of the water by said meter, at the average daily registration of water indicated by said meter for the period of three months subsequent to its repair or resetting after it has been properly repaired and reconnected to the service pipes, on his or her premises or place occupied or used as aforesaid. All expenses of meters, their connections and setting, water rates and other lawful charges for the supply of water shall be a lien upon the premises where

such water is supplied as now provided by law. Nothing herein contained shall be construed so as to remit or prevent the due collection of arrearages or charges for water consumption heretofore incurred, nor interfere with the proper liens therefor, nor of charges, or rates, or liens hereafter to be incurred for water consumption in any dwelling house, building, or place which may not contain one of the meters aforesaid. The moneys collected for expenses of meters, their connections and settings, shall be applied by the commissioner of water supply to the payment of expenses incurred in procuring, connecting and setting said meters. (*As amended by L. 1908, ch. 382, § 2.*)

Premises requiring meter.

A water meter having been installed upon an order of the commissioner of water supply, the owner of the apartment house is not entitled to an injunction to restrain the discontinuance of water service at a fixed rate, as he has a remedy either by mandamus to compel the furnishing of water or by a defense to an action for the water rents. *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216.

The installation of a water meter in an apartment house operating a café, restaurant, bar, billiard room, barber shop and garage for the convenience of its occupants, *held*, justifiable under the provisions of this section requiring installation of water meters in buildings using water for "business consumption." *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216.

Incorrect registration by meter.

The amount of water registered by a meter is controlling upon the consumer and a court of equity will not relieve him from paying the same on the ground of alleged error in the meter, at least not until an extraordinary case of extreme hardship is presented where it is conceded or demonstrated beyond question that through fraud, mistake or accident the record made by the meter is erroneous. *Pabst Brewing Co. v. Oakley*, 115 App. Div. 215, 100 N. Y. Supp. 794.

This section as amended by L. 1908, ch. 382, providing in case of failure of water meter to register, a charge may be made for the water during the interruption of registry at the average daily registration of the meter for the period of three months subsequent to repair of meter, has no retroactive effect i. e. applies only to cases of interruption of registry subsequent to passage of act on May 19, 1908. *People ex rel. Lind v. City of New York*, 63 Misc. 511, 117 N. Y. Supp. 1068, *aff'd* 133 App. Div. 932, 118 N. Y. Supp. 1134.

Prior to L. 1908, ch. 382, amending this section so as to provide that in case of water meter failing to register, a charge for water at average rate may be made during the interruption of registry, no average charge could be made when a meter became out of order and failed to register, § 473, limiting water charges by meters to "the quantity of water actually used as shown by said

meters." *People ex rel. McAuliffe v. City of New York*, 129 App. Div. 114 N. Y. Supp. 312.

Expense of installing meter.

The provisions of this section authorizing the commissioner of water supply to place water meters in the premises of consumers at their expense is in violation of the constitutional provision forbidding the taking of private property without due process of law. *Swanberg v. City of New York*, App. Div. 774, 108 N. Y. Supp. 364.

The charge for installation of water meter is an indebtedness incurred by the owner at the time of installation and is from that moment one, and constitutes an incumbrance under a deed containing a covenant against incumbrances, although the charge for installation was not entered in the register's books until after the conveyance. *Cuba v. Druskin*, 135 App. Div. 508, 120 N. Y. Supp. 381.

Liability for water rates as between landlord and tenant.

Water supplied through a meter under this section, is merely a voluntary purchase by the consumer from the city of such quantity of water as he chooses to buy, and the obligation to pay therefor must primarily rest upon him who buys and consumes the article. As the sale by the city is necessarily on credit as security for the payment of the debt, a lien is imposed upon the property itself under § 1017, *post*, for any unpaid charge. *Held* accordingly, where a landlord, in order to discharge a lien for water furnished to a tenant, paid the charges therefor to the city, he was subrogated to its rights against the tenant liable for the water. *New York University v. American Express Co.*, 197 N. Y. 294, *aff'd* 132 App. Div. 732, 117 N. Y. Supp. 387, which see 62 Misc. 122, 115 N. Y. Supp. 103.

A covenant by a tenant in a lease with his landlord to pay "the regular annual rent or charge" assessed or imposed upon the premises according to law for water rents, obligates him to pay the charges for water consumed as shown by water meter installed on the leased premises. *Loewenthal v. Michels*, 59 Misc. 195, 110 N. Y. Supp. 639.

Under a covenant by a tenant in a lease with his landlord to pay any rent or charge which may be "assessed or imposed according to law" for water as the same may become due and payable by meter measurement or otherwise, etc., a landlord who had installed a separate water meter in the tenant's premises may recover on his failure to pay for the water used, although the city authorities refuse to make out a separate assessment for the tenant's premises, but include the same in a total assessment against the whole building. *Myers v. Reade*, 112 App. Div. 363.

§ 479. Commissioner; duty in regard to sources of water supply and property of department. (See 3d Ed., p. 349.)

The city in maintaining a water supply for public use is acting as a government.

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mental agency in the work of the state itself and not as a proprietor engaged in a service for its own purposes and profits, and therefore it is not liable for negligence for non-user or mis-user in the maintenance of the system so far as the furnishing of the water itself is concerned; nor is the city liable for damages to a private person, because the water furnished by the city contained an unduly large proportion of chlorine, although such person was not to expense in purifying the

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Expense of installing meter.

The provisions of this section authorizing the commissioner of water supply to install water meters in the premises of consumers at their expense is not to be construed as forbidding the taking of private

*centum, and if not paid to

Water rents; when payable; penalty for non-payment.

§ 476. Annual frontage rates and extra and miscellaneous charges for water not metered shall be due and payable in advance on the first day of January in each year, if entered; and if not paid to or received by the department before the close of the last business day of the following March, shall be subject to a penalty of five per

centum on the first day of the next quarter, and a penalty of five per centum and, if not paid to or received by the department before the close of the last business day of the next succeeding quarter to a further penalty of ten per centum. Meter charges, including charges for the supply of water by meter and the expense of meters, their installation, connections, setting and maintenance, shall be due and payable when entered, and such charges when entered in any quarter of a year shall, after the mailing before or upon the close of such quarter of notice stating the amount due and the nature of the charge to the last known address of the person whose name appears on the record of such charges as being the owner, occupant or agent or, where no name appears, to the premises addressed to "owner or occupant" be subject, if not paid to or received by the department before the close of the last business day of the next quarter, to a penalty of five per centum and if not paid to or received by the department before the close of the last business day of the next succeeding quarter to a further penalty of ten per centum. The first annual frontage rates and extra and miscellaneous charges for water not metered due and payable in advance under this act shall include such rates and charges for a period of only eight months of the year, namely: May first to December thirty-first, inclusive, and shall be due and payable on the first day of May, if entered, and if not paid to or received by the department before the close of the last business day of the following July shall be subject to a penalty of five per centum, and if not paid to or received by the department before the close of the last business day of the following October, to a further penalty of ten per centum. (*As amended by L. 1912, ch. 108.*)

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mental agency in the work of the state itself and not as a proprietor engaged in a service for its own purposes and profits, and therefore it is not liable for negligence for non-user or mis-user in the maintenance of the system so far as the furnishing of the water itself is concerned; nor is the city liable for damages to a private person, because the water furnished by the city contained an unduly large proportion of chlorine, although such person was put to expense in purifying the water; nor is a duty imposed upon the city to furnish a supply of pure and wholesome water to such of its inhabitants as have places of business in that part of its territory which comprised the former city of Long Island, by the Charter of Long Island City (Laws 1871, ch. 461, T. I. T. 10), which provided that water commissioners should see that all proper measures were taken to preserve the purity of the water, or by reason of the provisions of this section and §§ 483 and 517, imposing on the city all the obligations of its former constituent elements, and directing the commissioner of water supply, gas and electricity to take such measures as are necessary to preserve the quantity and to keep it pure and wholesome and to prevent the contamination or pollution of any source of supply. The determination of the sources of supply is a *quasi* judicial and discretionary function so that there is no liability on the part of the city, because the sources of supply chosen are located in neighborhoods where the soil was exposed to the infiltration of sea water whenever heavy pumping occurred. *Oakes Mfg. Co. v. City of New York*, 141 App. Div. 130, 125 N. Y. Supp. 1030, *aff'g* 65 Misc. 97, 120 N. Y. Supp. 796.

§ 480. Assessment on lands used as reservoirs. (See 3d Ed., p. 350.)

The legislature clearly intended by this section to make liable to taxation in the counties in which they are situated, all lands taken by the city of New York for the maintenance of the water supply, and excluding only the aqueduct from such taxation. *Matter of City of New York v. Mitchell*, 183 N. Y. 245. *Comp. Matter of City of New York*, 117 App. Div. 811, 103 N. Y. Supp. 87.

§ 484. Duties of commissioner; to acquire title to property for water supply purposes; condemnation of lands and procedure prescribed.

By L. 1905, ch. 724, entitled "An act to provide for an additional supply of pure and wholesome water for The City of New York; and for the acquisition of lands or interest therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects," the city of New York was authorized to obtain sources for additional water supply, and a complete scheme for the condemnation of property needed for such additional water

supply is prescribed. This statute which is reprinted in full as an appendix at the end of this volume, must be consulted in connection with the existing provisions of the charter, §§ 483-508, inclusive, as it affects those sections and displaces some of them.

Commissioner to prepare maps. (See 3d Ed., p. 353.)

§ 486. Whenever in the opinion of said commissioner it is necessary to acquire any such real estate (as the term "real estate" is herein defined), for any of the purposes hereinbefore set forth, or for the purpose of extinguishing any right, title or interest thereto or therein, the said commissioner, for and on behalf of The City of New York, shall prepare a map or maps of the real estate which in his opinion it is necessary to acquire for the purposes hereinbefore set forth, and shall submit the same to the board of estimate and apportionment, for approval. The said board may adopt, modify or reject such maps in whole or in part, and may require others to be made instead thereof. A copy of the map or maps so prepared, with a certificate of the adoption thereof, signed by the commissioner and the secretary of the board, shall be filed in the office of said commissioner and be open to public inspection, and shall be the map or maps of the real estate to be acquired, subject to such changes or modifications as the said commissioner may from time to time deem necessary for the more efficient carrying out of the provisions of this act. And the said board of estimate and apportionment, prior to the final adoption of such map or maps, shall afford to all persons interested a full opportunity to be heard respecting such map or maps and the acquisition of the real estate shown thereon, and shall give public notice of such hearing, by publishing a notice, once in each week, for three successive weeks in the City Record, and the corporation newspapers, and in two papers published in the county or counties in which the real estate to be acquired or affected is situated, and in two daily papers in The City of New York. At such hearing or hearings testimony may be produced by the parties appearing before it in such manner as said board may determine, and the mayor is hereby authorized to administer oaths and issue subpoenas in any such proceeding pending before it. (*As amended by L. 1911, ch. 675.*)

Power to change maps.

The maps of the real estate to be taken for the water supply when once adopted cannot be changed or modified without the authority of the board of estimate and apportionment. This section vests the power of determining what lands shall be taken exclusively in the board of estimate and apportionment. Neither the commissioner of water supply nor the courts have any power to change, modify or amend the maps showing the lands

proposed to be taken. *Matter of City of New York*, 116 App. Div. 801, 102 N. Y. Supp. 116.

The scheme of the statute is that the lands must be designated by the board of estimate and apportionment after a hearing; the provision that the court may add other property and that the commissioner may change the maps for the more efficient carrying out of the provisions of the act, refers only to the carrying out of the changes made by the board of estimate and apportionment subsequent to its first adoption of maps. *Matter of City of New York*, 116 App. Div. 801, 102 N. Y. Supp. 116.

§ 496. Commissioners to prepare reports. (See 3d Ed., p. 359.)

Awarding of damages.

Laws 1905, ch. 724, providing for an additional water supply for The City of New York and the acts amendatory thereof (reprinted in Appendix) are not merely supplemental to the Greater New York Charter, but provide in detail for the various steps culminating in the adoption of the plan or system in furtherance of which condemnation is required, and the provisions of this section are therefore not applicable to a proceeding thereunder. *Matter of Board of Water Supply*, 62 Misc. 326, 116 N. Y. Supp. 142. See *contra*, *Matter of Simmons*, 61 Misc. 352, 113 N. Y. Supp. 890.

The right of an owner of lands beneath waters to cut and harvest ice is appurtenant to the ownership of the soil and must be deemed to have been included in the award made when the land itself was taken by eminent domain. *Matter of Daly*, 123 App. Div. 709, 108 N. Y. Supp. 635, *aff'd* 192 N. Y. 571.

An easement giving a right to use waters of a lake for mill purposes created by deed is not abandoned by mere non-user; there must be facts and circumstances showing an intention of the owner to abandon. *Matter of Daly*, 123 App. Div. 709, 108 N. Y. Supp. 635, *aff'd* 192 N. Y. 571.

Where an easement has been taken by the city for a public improvement and an award therefor has been made to the owner of the dominant estate, *held* that the owner of the servient estate could not contest such award upon the ground that the dominant owner has been paid twice for the easement. *Matter of Daly*, 123 App. Div. 709, 108 N. Y. Supp. 635, *aff'd* 192 N. Y. 571.

Under this section, the court has power to grant a motion to include an additional strip, in land to be acquired for water supply, although the trial has closed, the case has been summed up and counsel have submitted briefs, it being shown that the maps required in the original proceeding had been approved by the proper authorities in due form. *In re Water Supply of New York*, 125 App. Div. 905, 109 N. Y. Supp. 327.

Costs.

The provisions of this section of the charter authorizing the commissioners to recommend the allowance of such costs as they deem proper have not been

repealed by § 5 of ch. 725 of the Laws of 1906, authorizing the city to obtain sources for additional water supply. *Matter of City of New York (Town of Hempstead)*, 125 App. Div. 219, 109 N. Y. Supp. 652, aff'd 192 N. Y. 569.

An extra allowance of five per cent may be granted under this section and § 5 of ch. 725 of the Laws of 1905, and it is not necessary that the case should be difficult or extraordinary to uphold the allowance. *Matter of City of New York (Town of Hempstead)*, 125 App. Div. 219, 109 N. Y. Supp. 652, aff'd 192 N. Y. 569.

§ 505. Proceedings in case of an appeal. (See 3d Ed., p. 364.)

The provision of this section that in the event of a new appraisal the second report shall be final and conclusive upon all persons interested has no application where the first appraisal was set aside by the court and a new appraisal ordered before other commissioners. In such a case an appeal lies from the report of the new commissioners. *Matter of Daly*, 189 N. Y. 34, rev'g 116 App. Div. 798, 102 N. Y. Supp. 22.

§ 507. Agreements with owners of real estate. (See 3d Ed., p. 365.)

It seems that the commissioner of water supply is not obliged to make an attempt to reach an agreement with the owner of lands upon the price to be paid as a condition of exercising the power to take them by condemnation. *Matter of City of New York (Town of Hempstead)*, 125 App. Div. 219, 109 N. Y. Supp. 652, aff'd 192 N. Y. 569.

§ 508. Compensation and expenses of commissioners. (See 3d Ed., p. 366.)

It seems that the provisions of this section have been superseded by § 5 of ch. 725 of the Laws of 1905, printed as an appendix at the end of this volume. *Matter of City of New York (Town of Hempstead)*, 125 App. Div. 219, 109 N. Y. Supp. 652, aff'd 192 N. Y. 509.

§ 516. Corporations authorized to use ground under streets.
(See 3d Ed., p. 368.)

Right to lay water mains under ground.

Under the provisions of the Transportation Law requiring the consent of the local authorities of an adjoining city or village as a condition of laying down water mains by a corporation organized under the statute to supply water, *held*, that the local authorities designated was the legislative body empowered to grant franchises for the use of the street, and that a mere permit to lay mains obtained from the administrative officers of the city, e. g., the president of the borough or the commissioner of water supply or a contract with the city to supply it with water were not equivalent to a fran-

chise to lay mains for that purpose, nor is a right to lay such mains without a franchise conferred by § 516, *ante*, providing that all persons acting under the authority of the city shall have the right to use the soil under public streets for the purpose of introducing water into the city of New York, because without a franchise the company is not acting under the authority of the city. *Richards v. Citizens' Water Supply Co.*, 140 App. Div. 206, 125 N. Y. Supp. 116.

Legal effect of charter upon new aqueduct; term of commissioners limited. (See 3d Ed., p. 369.)

§ 518. Nothing in this act contained shall be deemed or construed to repeal, or in any wise affect chapter four hundred and ninety of the laws of eighteen hundred and eighty-three, or the several acts amendatory thereof, but the said act and its amendments shall remain in full force and effect, except as herein provided. The term of office of the commissioners appointed and existing under the aforesaid act shall cease and determine on the first day of June, nineteen hundred and ten, and from and after said date the office of aqueduct commissioner, and the aqueduct commission shall be and hereby is abolished, and thereupon all papers, documents and records in possession of the aqueduct commissioners shall be delivered to the commissioner of the department of water supply, gas and electricity, who shall have all the powers heretofore vested by law in the said aqueduct commissioners. All persons in the employ of the aqueduct commission when this act takes effect shall, upon the passage of this act, be transferred to and subject to the jurisdiction of the department of water supply, gas and electricity of The City of New York and all persons so transferred shall be subject to the provisions of the civil service law and the rules and regulations of the civil service commission of The City of New York in so far as said civil service law and said rules and regulations of said civil service commission apply to the said persons prior to the time of such transfer, as aforesaid. (*As amended by L. 1910, ch. 220.*)

The commissioner of water supply succeeded to the powers vested in the commissioner of public works under the Aqueduct Act, L. 1883, ch. 490, with respect to the making of the basic plans for the building of the aqueduct and the aqueduct commissioners have no power under the guise of a modification of plans made by the commissioner of public works to institute a new plan for the work. If such a modification be required it can only be made by the commissioner of water supply. *Killough v. McClellan, Bischoff, J.*, Sp. T., N. Y. Law Jour., December 21st, 1909.

The provisions of this section as originally enacted prohibited the commissioners from beginning any new work for the aqueduct. In 1901 this

section was reframed so as to continue the commissioners in office until the completion of the work of building the aqueduct. Under the section as amended, the commissioners are not only authorized to complete the work already instituted by them, but may institute any new work required to build the aqueduct with the necessary reservoirs contemplated by the Aqueduct Act. *Walter v. McClellan*, 48 Misc. 215, 96 N. Y. Supp. 479, aff'd 113 App. Div. 295, 99 N. Y. Supp. 78.

§ 525. Removal of electric wires. (See 3d Ed., p. 372.)

See *People ex rel. New York Electric Lines Co. v. Ellison*, cited under § 528, *post*.

§ 528. Underground electrical conductors; permit necessary to take up pavement, etc.; commissioner of water supply, etc., to determine method of extension; board of aldermen may enact ordinances regulating use, etc.
(See 3d Ed., p. 374.)

Authority to lay pipes and wires underground.

The power to grant a franchise to a corporation to lay wires for distributing electricity under the streets is conferred on the board of estimate as the "municipal authorities" within Transportation Corporation Laws (L. 1909, ch. 219, § 61), and not upon the commissioner of water supply, gas and electricity as successor of the board of electrical control. *People ex rel. West Side El. Co. v. Consolidated Tel. & E. Subway Co.*, 187 N. Y. 58, aff'g 110 App. Div. 171, 96 N. Y. Supp. 609.

The consent of the municipal authorities of the city to the use of its streets to a company to operate electric wires within the city may be revoked at any time before the company has acted upon or accepted the same. *Matter of New York Electric Lines Co.*, 69 Misc. 200, 126 N. Y. Supp. 331.

Under the provisions of the Transportation Law requiring the consent of the local authorities of an adjoining city or village as a condition of laying down water mains by a corporation organized under the statute to supply water, *held*, that the local authorities designated was the legislative body empowered to grant franchises for the use of the street and that a mere permit to lay mains obtained from the administrative officers of the city, e. g., the president of the borough or the commissioner of water supply, or a contract with the city to supply it with water were not equivalent to a franchise to lay mains for that purpose, nor is a right to lay such mains without a franchise conferred by § 516, *ante*, providing that all persons acting under the authority of the city shall have the right to use the soil under public streets for the purpose of introducing water in the city of New York, because without a franchise the company is not acting under the authority of the city. *Richards v. Citizens' Water Supply Co.*, 140 App. Div. 206, 125 N. Y. Supp. 116.

A permit to open the streets for the purpose of placing wires in the electric subway should be applied for only after space has been assigned in the subway to the applicant, and therefore it is no defense to a proceeding by mandamus to compel the corporation operating such subway to assign space therein to a party entitled thereto that such party has not obtained a permit from the commissioner under this section to open the street and to lay wires in the subway. *Matter of Long Acre El. Light & Power Co.*, 188 N. Y. 361, aff'g 117 App. Div. 80, 102 N. Y. Supp. 242, which aff'd 51 Misc. 407, 101 N. Y. Supp. 460.

The statutes providing for the laying of electric wires in underground conduits contemplate that there shall be only one system of conduits in the city and therefore the commissioner of water supply is justified in refusing to grant a permit to open the streets for the purpose of constructing an independent system of conduits. *People ex rel. N. Y. Electric Lines Co. v. Ellison*, 188 N. Y. 523, aff'g 115 App. Div. 254, 101 N. Y. Supp. 55.

A statute incorporating a gas company provided that the company would have the power to sell gas in any part of New York City, provided that no street shall be dug into without the permission of the municipal authorities or of a majority in interest of the adjacent property holders. *Held* that the statute granted a perpetual and absolute franchise, which needed no secondary franchise from the legislative branch of the municipal government, but merely an administrative consent as to time and place, in order to make it operative, to authorize the gas company to dig up the streets and lay pipes. It seems that even if the franchise did require a secondary franchise or legislative grant by the municipal government of permission to lay pipes in the streets, an ordinance giving permission to lay pipes in the streets for thirty years would give the right to perpetually maintain all pipes that had been laid during the thirty years by a company that possessed the franchise from the state. *City of New York v. N. Y. Mutual Gas, etc., Co.*, 135 App. Div. 260, 120 N. Y. Supp. 776.

No person to operate moving picture apparatus and its connections without a license. (New.)

§ 529a. It shall not be lawful for any person or persons to operate any moving picture apparatus and its connections in The City of New York unless such person or persons so operating such apparatus is duly licensed as hereinafter provided. Any person desiring to act as such operator shall make application for a license to so act to the commissioner of water supply, gas and electricity of The City of New York who shall furnish to each applicant blank forms of application which the applicant shall fill out.

The commissioner of water supply, gas and electricity shall make rules and regulations governing the examination of applicants and the issuance of licenses and certificates.

The applicant shall be given a practical examination under the direction of the commissioner of water supply, gas and electricity and if found competent as to his ability to operate moving picture apparatus and its connections shall receive within six days after such examination a license as herein provided. Such license may be revoked or suspended at any time by the commissioner of water supply, gas and electricity. Every license shall continue in force for one year from the date of issue unless sooner revoked or suspended. Every license, unless revoked or suspended, as herein provided, may at the end of one year from the date of issue thereof be renewed by the commissioner of water supply, gas and electricity in his discretion upon application and with or without further examination as said commissioner may direct. Every application for renewal of license must be made within the thirty days previous to the expiration of such license. With every license granted there shall be issued to every person obtaining such license a certificate, made by the commissioner of water supply, gas and electricity or such other officer as such commissioner may designate, certifying that the person named therein is duly authorized to operate moving picture apparatus and its connections. Such certificate shall be displayed in a conspicuous place in the room where the person to whom it is issued operates moving picture apparatus and its connections. No person shall be eligible to procure a license unless he shall be a citizen of the United States and of full age. Any person offending against the provisions of this section, as well as any person who employs or permits a person not licensed as herein provided to operate moving pictures apparatus and its connections, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding the sum of one hundred dollars or imprisonment for a period not exceeding three months, or both, in the discretion of the court. (*Added by L. 1910, ch. 654.*)

Commissioner of street cleaning; jurisdiction.

§ 534. The commissioner of street cleaning shall have cognizance and control:

1. Of the sweeping and cleaning, sprinkling, flushing or washing and sanding of the streets of the boroughs of Manhattan, the Bronx and Brooklyn, and of the removal, or other disposition as often as the public health and the use of the streets may require, of ashes, street sweepings, garbage, and other light refuse and rubbish, and of the removal of snow and ice from leading thoroughfares and from such other streets within said boroughs as may be found practicable; and, as necessary, shall furnish scows or other suitable receptacles to re-

move or otherwise dispose of, and shall remove or otherwise dispose of all ashes from the docks of Blackwell's and Randall's islands.

2. Of the framing of regulations controlling the use of sidewalks and gutters by abutting owners and occupants for the disposition of sweepings, refuse, garbage, or light rubbish, within such boroughs, which, when so framed, and approved by the board of aldermen shall be published in like manner as city ordinances, and shall be enforced by the police department in the same manner and to the same extent as such ordinances. (*As amended by L. 1911, ch. 680.*)

Liability for acts of street cleaning department.

The city is not liable for an unauthorized arrest made by a police officer upon the investigation of a member of the street cleaning department for an alleged violation of the city ordinance prohibiting persons from throwing refuse into the street. *Clayman v. City of New York*, 117 App. Div. 565, 102 N. Y. Supp. 661.

§ 537. Removal of members of clerical and uniformed forces.
(See 3d Ed., p. 382.)

Limitations upon power of removal.

"It is clear that in order to justify a removal certain formalities must be observed. There must be (a) A statement of charges with a specification of facts sufficiently distinct to apprise the subordinate of the grounds upon which the charges are based." *People ex rel. Kennedy v. Brady*, 166 N. Y. 44, 48, citing *People ex rel. Keech v. Thompson*, 94 N. Y. 451. (b) Notice of the time and place when an opportunity for an explanation will be given; and such opportunity must be given (*ibid*). (c) The explanation must be fairly and reasonably considered. "It must not be a mere form to precede a predetermined removal." *People ex rel. Mitchell v. La Grange*, 2 App. Div. 444, 447, *aff'd* on the opinion below, 151 N. Y. 664. Although the requirements (a) and (b) have been denominated "formalities." (*People ex rel. Kennedy, supra*, at p. 48), they are not to be interpreted in such sense as to require a formal trial nor pedantic compliance with any particular form. The charge need not necessarily be in writing. *Keech case, supra*, p. 464. No considerable interval need elapse between preferring the charge and the opportunity for an explanation. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, *aff'd* 179 N. Y. 525; *People ex rel. Baum v. Butler*, 120 App. Div. 807. "The superior may dispense with witnesses, and may act upon facts known to him or based on information received from others." *People ex rel. Kennedy, supra*, p. 58. After the accused has made his explanation, which, says Allen, J., in *Munday v. Fire Commissioners*, 72 N. Y. 445, "may consist either in . . . explaining the unfavorable appearance or disproving the charges," the superior must act upon it in good faith. *People ex rel. Mitchell, supra*, p. 447. Or as put by the Court of Appeals in *People ex rel. Kennedy (supra)*: "The reasons assigned for the removal must appear upon their face to justify the action; in other words, they must be substan-

tial and not frivolous; but when they appear to be sufficient to justify the determination the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the head of the department. . . . The courts have no power to interfere with his discretion in that regard." Bijur, J., in *People ex rel. Adamson v. Edwards*, Sp. T., N. Y. Law Jour., January 31st, 1912.

Remedy for wrongful removal.

Mandamus and not *certiorari* is the appropriate remedy to compel the reinstatement of a member of the force, removed without the formalities prescribed by this section, e. g., failure to notify him of the cause for his removal and afford him an opportunity for explanation. *People ex rel. Lahey v. Woodbury*, 112 App. Div. 79, 98 N. Y. Supp. 142.

Cause for removal.

Where a member of the department was alleged to have been guilty of insolent conduct upon a hearing before the deputy commissioner and was immediately taken before the commissioner and charged therewith and was then and there afforded an opportunity for explanation which he refused to give upon the ground that he had not been given a reasonable notice of charges, *held*, that he was not entitled to reinstatement; that the statute fixed no time within which notice of charges must be given and that he had reasonable notice of the charges under the circumstances of the case. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161, *aff'd* 179 N. Y. 525.

An employee of the street cleaning department prior to removal is not entitled to be sworn or to introduce witnesses, nor entitled to a trial or judicial hearing, but only to be notified of the charge and afforded an opportunity to make an explanation. The act of the commissioner in removing the employee is not a judicial act in any sense, which can be reviewed by *certiorari*. *People ex rel. Picceola v. Woodbury*, 114 App. Div. 188, 99 N. Y. Supp. 573.

The action of the commissioner in removing a district superintendent upon charges of incompetency, crippling the department during a strike of street sweepers upheld, and a summary hearing justified in view of the situation prevailing which rendered prompt action imperative. *People ex rel. Adamson v. Edwards*, Sp. T., Bijur, J., N. Y. Law Jour., January 31st, 1912.

Salary during period of absence or removal.

Where a member of the department who had been removed and reinstated brings an action against the city to recover his salary during the period of removal, *held* that the city had the right to deduct from such salary the sum earned by him in another occupation during such period. *Gutheil v. City of New York*, 119 App. Div. 20, 103 N. Y. Supp. 972.

A member of the uniformed force who applies for and receives leave of

absence without pay, waives his right to salary during such period and cannot bring an action against the city therefor. *Tepidino v. City of New York*, 50 Misc. 324, 98 N. Y. Supp. 693.

A member of the uniformed force cannot recover wages during a period of absence without leave although such absence was caused by an injury sustained in the service of the department. *Rogers v. City of New York*, 120 App. Div. 513, 105 N. Y. Supp. 172.

Division of streets into districts for street cleaning; allotment of sweepers. (See 3d Ed., p. 385.)

§ 539. All the paved avenues, streets, lanes, alleys and places in said city which the department of street cleaning is by this act charged with the duty of cleaning, shall be cleaned and kept clean by hand labor, and for that purpose each sweeper shall provide himself with such tools and implements as the commissioner of street cleaning shall prescribe, and to each sweeper shall be allotted a fixed area of street surface according to the character of the locality; of which allotment a record shall be kept in the department of street cleaning and shall be a public record, but nothing in this section contained shall be deemed to prevent the commissioner of street cleaning from causing the labor of the sweepers to be supplemented by the use of sweeping and flushing or washing machines in such streets and avenues as to him may seem proper. It shall be the duty of the commissioner of street cleaning to divide the city into a suitable number of districts, not exceeding twenty-one, each of which shall be under the charge and supervision of a district superintendent who shall be directly responsible to the general superintendent, and also to the commissioner of street cleaning for the cleanliness of his district. Each of said districts shall be by said commissioner sub-divided into sections in charge of foremen responsible to the district superintendent, as well as to the general superintendent, and to the commissioner of street cleaning for the cleanliness of his section. It shall be the duty of said commissioner of street cleaning to make such allotment and designation of the area to be covered, and the duties to be performed by the uniformed force, that each member thereof except the general superintendent and his assistant shall have one particular district or section in which to perform all the work to which he is allotted. But nothing herein contained shall be so construed as to prevent the commissioner of street cleaning from transferring, at his discretion, members of the uniformed force, from one district or section to another, nor from temporarily employing all or any number of said uniformed force in a particular street or streets, section or sections. (*As amended by L. 1909, ch. 397, § 1.*)

Commissioner of street cleaning; power to obtain plant, supplies, et cetera. (See 3d Ed., p. 386.)

§ 541. The said commissioner of street cleaning shall have power, and it shall be his duty, to purchase or hire from time to time for his use as such commissioner, at current prices, such and so many horses, carts, steam tugs, scows, boats, vessels, machines, tools and other property as may be required for the economical and effectual performance of his aforesaid duty or to contract for the construction of any such tugs, scows, boats, vessels, carts, machines, tools or other property; or for the sweeping, cleaning, sanding, sprinkling and flushing or washing of streets and the removal of street sweepings, and also to contract for the cremation, utilization or burning of street sweepings, refuse and garbage; or for the melting or removal of snow upon or from any streets or avenues or parts thereof. The title to property so purchased or constructed shall be in The City of New York. All such hiring, or purchases, or contracts, however, exceeding one thousand dollars in amount at any one hiring or purchase, shall be let by contract to the lowest bidder therefor, founded on sealed bids or proposals made in compliance with public notice advertised in the City Record; such notice to be published at least ten days prior to the opening of such proposals or bids. Provided, that nothing herein contained shall prevent said commissioner, whenever it shall be necessary, to hire such horses, carts, boats, steam tugs, scows, vessels, machines, or tools for a day or trip, and for successive days or trips, without advertising of contract founded on sealed proposals or bids, at compensation by the day or trip, notwithstanding the aggregate compensation for such successive days or trips may exceed said sum of one thousand dollars. The said commissioner is hereby authorized, whenever and as often as, in his opinion, the public interests shall require, to reject all bids or proposals received in answer to any such advertisement, and to re-advertise for bids and proposals as herein-after provided. Whenever the said commissioner shall deem it necessary, he shall and is hereby authorized to sell, at public auction, any plant, material, horses, carts, scows or other property, used in any way in connection with the work of cleaning streets; but before any such sales shall be made a notice thereof stating the time and place of sale shall be published in the City Record and corporation newspapers for at least ten days immediately preceding such sale, and the proceeds arising from such sale, after deducting the necessary expenses thereof, shall be paid into the city treasury to the credit of the general fund for the reduction of taxation. The said commissioner is hereby authorized, with the consent and approval of the board of sinking fund commissioners, to hire or lease for periods not

exceeding ten years suitable and sufficient offices for the transaction of the business under his charge, and also such stables and other buildings or parts of buildings or plots of ground as may, from time to time, be necessary. All carts used by said department of street cleaning shall be of such size, form and construction as to prevent escape during transit of dust, or of any refuse carried therein. (*As amended by L. 1909, ch. 397, § 1.*)

Construction of lease.

Under a lease for five years entered into pursuant to this section providing that either party thereto could terminate the same at the expiration of one year on sixty days' notice in writing *held* that the notice to be effective must have been given within sixty days of the expiration of the first year and could not be given thereafter. *Fire Realty Co. v. City of New York*, 53 Misc. 246, 103 N. Y. Supp. 115.

Commissioner of street cleaning; power to contract for flushing streets. (New.)

§ 541a. The commissioner of street cleaning shall have power and he is hereby authorized to enter into a contract or contracts for cleaning, sprinkling, sanding and flushing or washing with machines the public streets, avenues, highways, boulevards, squares, lanes, alleys and other public places in The City of New York for a period of not more than five years, terminable at any time by said commissioner after three years on three months' notice. And the department of water supply, gas and electricity, whenever the head of said department shall be of the opinion that there is a sufficient supply of water for this purpose, is hereby authorized to permit said commissioner of street cleaning and the person or persons to whom said contract or contracts may be awarded, to use as much water as may be necessary for the said purpose of flushing or washing the streets, avenues, highways, boulevards, squares, lanes, alleys and other public places of the city; provided always, however, that every such contractor shall be required to pay to The City of New York, through the department of water supply, gas and electricity, at its own cost and expense at current rates for the use of such water. The comptroller of The City of New York is hereby authorized, under the direction and authority of the board of estimate and apportionment, to issue special revenue bonds to the amount required to carry into effect the provisions of the said contracts when awarded as authorized under this section and in the manner provided in section five hundred and forty-one of this act. (*Added by L. 1909, ch. 397, § 2.*)

§ 544. Special contracts for disposition of sweepings, ashes, garbage, etc. (See 3d Ed., p. 388.)

Where the street cleaning commissioner advertised for bids for the privilege of picking over the refuse at dumps of the department as enumerated and entered into a contract granting that privilege for the same dumps, *held*, that a covenant by the city to deliver all of its refuse gathered from street cleaning at those dumps was implied by law even if exact words to that effect are wanting. Hence, such a contract is not void for lack of mutuality but is binding upon the contractor and he is liable for his default thereon. *City of New York v. Paoli*, 202 N. Y. 18, *aff'g* 136 App. Div. 939, 121 N. Y. Supp. 1127.

Devolution of powers of former boards as to cleaning streets.
(See 3d Ed., p. 393.)

§ 547. All the powers and duties conferred upon the corporation heretofore known as the mayor, aldermen and commonalty of The City of New York, or upon any board or officer thereof, or upon the corporation known as The City of Brooklyn, or upon any board or officer thereof, or upon the corporation known as Long Island City, or upon any board or officer thereof, and upon any other municipal corporation, town or village, within the county of Richmond, or within so much of the territory of the county of Queens as is by this act annexed to the municipal corporation known as the mayor, aldermen and commonalty of The City of New York, and consolidated into the municipality known as The City of New York, relating in any way to the sweeping and the cleaning, sprinkling, sanding and flushing or washing of the streets, avenues, highways, boulevards, squares, lanes, alleys and other public places of the city, and of the removal, or other disposition as often as the public health and the use of the streets may require, of ashes, street sweepings, garbage and other light refuse and rubbish, and of the removal of snow and ice from leading thoroughfares and from such other streets as may be found practicable; of the removal of incumbrances; of the issue of permits to builders and others to use the streets, avenues, highways, boulevards, squares and public places, but not to open them; of the framing of regulations controlling the use of sidewalks and gutters by abutting owners and occupants for the disposition of sweepings, refuse, garbage or light rubbish, are hereby vested in The City of New York, and as matters of administration devolved upon the commissioner of street cleaning of said city, as to the boroughs of Manhattan, The Bronx and Brooklyn, and upon the presidents of Queens and Richmond as to those boroughs, to be by them executed pursuant to the powers, provisions and limitations of this act. (*As amended by L. 1909, ch. 397, § 2.*)

Street cleaning department; relief and pension fund. (New.)

§ 548. There shall be a relief and pension fund of the department of street cleaning which shall be made up, administered and used for the benefit of the members of the clerical and uniformed forces of the department of street cleaning as defined by section five hundred and thirty-six of the charter, and the incumbents of such other positions in said department as have been created and not specified in section five hundred and thirty-six of the charter. (*Added by L. 1911, ch. 839.*)

Of what fund consists. (New.)

§ 549. The relief and pension fund of the department of street cleaning of The City of New York shall consist of the following moneys and the interest and income thereof:

First. A sum of money equal to, but not greater than, three per centum of the weekly or monthly pay, salary or compensation of each such member of the department of street cleaning, which sum shall be deducted, weekly or monthly, as the case may be, by the comptroller from the pay, salary or compensation, of each and every such member of the department of street cleaning, and the said comptroller is hereby authorized, empowered and directed to deduct said sum of money as aforesaid, and to pay the same monthly to the treasurer and trustee of the relief and pension fund of the department of street cleaning.

Second. All money, pay, compensation or salary, or any part thereof, forfeited, deducted or withheld from any such member of the department of street cleaning on account of fines, suspensions or absence from any cause, loss of time, sickness or other disability, physical or mental, to be paid monthly by the comptroller to the treasurer and trustee of said pension fund, except in the case of a sweeper, driver, hostler, stableman or other employee who may have been sick or absent from any cause, and whose position has been filled by an extra sweeper, driver, stableman or other temporary employee, to whom compensation has been paid.

Third. All moneys received for the privilege of scow trimming or assorting of refuse at the various dumps in the boroughs of Manhattan, Brooklyn or Bronx, or at any other place where refuse may be disposed of, excepting in so far as the provisions of any contract now in force between The City of New York and contractors give such privilege to the contractors. All contracts hereafter made shall stipulate that the proceeds from such trimming or assorting of refuse shall be paid by the comptroller to the trustee and treasurer of said pension fund.

Fourth. All moneys received from the sale of steam or house ashes,

garbage and refuse, collected by the department of street cleaning, and any moneys that may be received for the disposal of such steam or house ashes, garbage or refuse.

Fifth. All proceeds of sales of condemned horses or other property of said department, excepting real property; and so much of the proceeds of sales of unharnessed trucks, carts, wagons and vehicles of any description, and of all boxes, barrels, bales or other merchandise, or other movable property, found in any public street or place and removed therefrom by the commissioner of street cleaning under any provision of law authorizing said commissioner to remove and to sell such incumbrances, as exceeds the necessary expense of the sales of such condemned property or unredeemed incumbrances and which is not, under such provision of the law, payable to the lawful owner or owners of such incumbrances so sold, and all moneys collected for the release of merchandise, unharnessed vehicles or movable property removed as aforesaid.

Sixth. Any and all unexpended balances of amounts appropriated for the payment of salaries or compensation of such members of the department of street cleaning remaining unexpended after the allowance of all claims payable therefrom. And the comptroller is hereby authorized to pay over such unexpended balances to the treasurer and trustee of said pension fund at any time after the expiration of the year for which such amounts were appropriated, after allowing sufficient to satisfy all the claims payable therefrom as aforesaid.

Seventh. All gifts or bequests which may be made to said fund or the commissioner of street cleaning as treasurer and trustee of said fund. (*Added by L. 1911, ch. 839.*)

Commissioner, trustee and treasurer of fund. (New.)

§ 550. The commissioner of street cleaning shall be the trustee and treasurer of said relief and pension fund. He shall, before entering upon his duties as treasurer and trustee thereof, deliver to the comptroller a bond in the penal sum of seventy-five thousand dollars, to be approved by the comptroller, conditioned for the faithful discharge and performance of his duties as such treasurer and trustee. Compensation shall be made to the commissioner of street cleaning for the expense of procuring sureties for said bond, to be paid out of said pension fund. Said treasurer and trustee shall have charge of and administer said fund. He shall receive all moneys applicable to said fund, and, from time to time, shall invest such moneys, or any part thereof, in any manner allowed by law for investments by savings banks, as he shall deem beneficial to said fund; and he is empowered to make all necessary contracts and to conduct necessary

and proper actions and proceedings in the premises, and to pay from said fund the relief or pensions granted in pursuance of this act. And he is authorized and empowered to establish, from time to time, such rules and regulations for the disposition and investment, preservation and administration of said pension fund as he may deem best. No payment whatever shall be allowed or made by said treasurer and trustee from said fund as reward, gratuity or compensation to any person for salary or service rendered to or for said treasurer and trustee, except payment of necessary legal expenses and compensation as aforesaid for the expense of procuring sureties on said bond. The commissioner of street cleaning may employ the members of the clerical force in such clerical work as may be necessary for the care and administration of said fund as a part of their regular duties and without extra compensation. On or before the first day of February of each year the said treasurer and trustee shall make a verified report to the mayor containing a statement of the account of said fund under his control and of all receipts, investments and disbursements, on account of said fund, together with the name and residence of each beneficiary. There shall be an auditing committee consisting of three members of the department of street cleaning, to be appointed by the mayor. It shall be the duty of such auditing committee, on or before the first day of March in each year, to examine the condition of said relief and pension fund and to audit the accounts of said treasurer and trustee and to make report thereon to the mayor within thirty days thereafter. (*Added by L. 1911, ch. 839.*)

Commissioner as trustee authorized to take gifts for fund.
(New.)

§ 551. The commissioner of street cleaning, as treasurer and trustee of said relief and pension fund, is hereby authorized and empowered to take and hold any and all gifts or bequests which may be made to such fund, and to transfer such gifts or bequests to his successor, together with all other moneys or property belonging to said fund. (*Added by L. 1911, ch. 839.*)

Retiring members of street cleaning force; pensions, etc.
(New.)

§ 552. The commissioner of street cleaning shall have power in his discretion to retire and dismiss from membership in his department a member of the department of street cleaning as hereinafter provided; and he shall grant relief or a pension to such member so retired and dismissed from membership, and to the widows and orphans of members of said department who may be entitled to receive such

relief or pension, to be paid from said relief or pension fund, in monthly instalments, as follows:

First. To any such member who, at any time after the passage of this act, while in the actual performance of duty, and without fault or misconduct on the part of such member, shall have become permanently disabled, physically or mentally, so as to be unfit to perform the duties required of such member, provided that such unfitness for duty has been certified to by a majority of the medical examiners of said department, the sum of twenty-five dollars per month.

Second. To the widow of any member of the department of street cleaning who, after the passage of this act, shall have been killed while in the actual performance of his duty, or shall have died from the effects of any injury received while in the actual performance of such duty, the sum of not more than three hundred dollars per annum; and to the widow of any member of such force who shall hereafter die and who shall have been ten years in the service in said department at the time of his death, or who shall have been retired on a pension, as hereinafter provided, if there shall be no child or children of such member under eighteen years of age, the sum of not more than two hundred dollars per annum, in the discretion of said treasurer and trustee; and if there be such child or children of such member under the age aforesaid, then such sum may be divided between such widow, child or children in such proportion and in such manner as the said treasurer and trustee may direct. The right of such widow to such pension shall cease and terminate at her death or remarriage; or if she shall have been guilty of conduct which in the opinion of said treasurer and trustee renders payment inexpedient.

Third. To any child or children under eighteen years of age of such member killed or dying as aforesaid, or dying after retirement leaving no widow, or if a widow, then after her death, a sum not exceeding two hundred dollars per annum to be paid as such treasurer and trustee shall direct until such child or children shall have attained the age of eighteen years or shall have married.

Fourth. To the widowed mother of any such member, who was the sole support of such mother, who shall die after the passage of this act, a sum not to exceed two hundred dollars per annum, to cease upon the death or remarriage of such widowed mother. (*Added by L. 1911, ch. 839.*)

Term of service of street cleaning force entitling to pension.
(New.)

§ 553. Any such member who has or shall have performed duty as

such member for a period of ten years or upwards shall be relieved and dismissed from said force upon his or her own application, or by order of the commissioner, upon an examination by the medical examiners of said department, to be made at any time when so applied for or when so ordered, if a majority of such medical examiners shall certify that such member is permanently disabled, physically or mentally, so as to be unfit for duty; and such member so relieved and dismissed from said force shall be paid from said fund in monthly instalments during his or her lifetime a sum not less than one-half of the annual salary or compensation of such member when he or she was so retired; and any such member who shall have performed duty on said force for a period of twenty years or upward, whether continuous or rendered during different periods, and who has reached the age of sixty years, may, upon the application of such member in writing, be relieved and dismissed from said force and service, and shall be paid from said fund in monthly instalments during his or her lifetime a sum not less than one-half of the annual salary or compensation of such member when so retired; provided, however, that no such member shall be so retired or granted a pension while there are charges of official misconduct pending against him or her. Pensions granted under this section shall be for the natural life of the pensioner and shall not be revoked, repealed or diminished. (*Added by L. 1911, ch. 839.*)

Rules regulating pensions to be made. (New.)

§ 554. The commissioner of street cleaning, as such treasurer and trustee, is authorized and empowered to make and enforce all such rules, orders and regulations as may be necessary to carry out the provisions of this act relative to pensions and may employ members of the department for such purpose so far as may be required. (*Added by L. 1911, ch. 839.*)

Money of pension fund exempt from execution. (New.)

§ 555. The moneys or other property of the relief and pension fund of the department of street cleaning and all pensions or relief moneys granted and payable from said fund shall be, and the same are, exempt from levy and sale under execution, and from all processes or proceedings to enjoin payment, or to recover such moneys or property, by or on behalf of any creditor or other person having or asserting any claim against, or debt or liability of any person entitled to such pension or relief. (*Added by L. 1911, ch. 839.*)

Pension fund; when to come into existence. (New.)

§ 556. This act shall take effect October first, nineteen hundred and

eleven, so far as it applies to the deduction by the comptroller of three per centum of the pay, salary or compensation of the members of the department of street cleaning, and to the collection and taking over by said treasurer and trustee of such other moneys as are provided by this act to be taken for such fund, and all such moneys shall be so taken and held for such purpose by said treasurer and trustee on and after said date. Provided, however, that no such deduction of such per centum shall be made by the comptroller from the pay, salary or compensation of any person who is or was a member of the department of street cleaning on or before September first, nineteen hundred and eleven, unless such member shall have given his or her consent in writing to the commissioner of street cleaning on or before that date that he or she agrees to abide by the provisions of this act and authorizes the comptroller of The City of New York to so deduct such per centum; and any such member who fails to give such written consent shall not be entitled to be or to become a beneficiary of said relief and pension fund; but such deduction of such per centum shall be made by the comptroller without such consent from the pay, salary or compensation of any person who shall become a member of the department of street cleaning after September first, nineteen hundred and eleven, and all such persons shall be entitled to or become beneficiaries of said relief and pension fund without such written consent to such deduction. (*Added by L. 1911, ch. 839.*)

Persons entitled to pension fund. (New.)

§ 557. No relief or pension shall be paid to any person under the provisions of this act, and no person shall be entitled to receive any of the benefits provided for in this act prior to January first, nineteen hundred and thirteen, excepting that relief and pensions granted under the provisions of this act shall be payable to and through members of the department who shall die or become disabled on and after September first, nineteen hundred and eleven, but the payment of such relief or pension shall be postponed until January first, nineteen hundred and thirteen, on which date the provisions of this act providing for the payment of relief or pensions shall take effect. (*Added by L. 1911, ch. 839.*)

Pension fund, act creating, to take effect immediately. (New.)

§ * 558. Except as hereinbefore otherwise provided, this act shall take effect immediately. (*Added by L. 1911, ch. 839.*)

* So in original (Evidently intended to be § 2 of L. 1911, ch. 839.)

§ 595. Commissioner of bridges; jurisdiction. (See 3d Ed., p. 394.)

Powers and duties of commissioner.

The provisions of this section confer no power upon the commissioner of bridges or the board of estimate to authorize the operation of a railroad upon the Queensborough bridge spanning the East river. This section permits the operation of a railroad only on the New York and Brooklyn bridge. So held, holding the city not liable for injuries sustained by a passenger on the electric railroad operated on the Queensborough bridge through the negligence of an employee of the department of bridges. *Dilluvio v. City of New York*, 73 Misc. 122, 132 N. Y. Supp. 531.

The construction of the municipal building authorized under L. 1907, ch. 670, was placed under jurisdiction of the department of bridges, and the approval of the superintendent of buildings is not necessary to the plans of the building when the same have been approved by the board of estimate and the commissioners of bridges. *Schieffelin v. City of New York*, 65 Misc. 609, 112 N. Y. Supp. 502; *Wheeler v. Same*, 122 N. Y. Supp. 627.

A market in the space between Pitt and Willet streets under the Manhattan approach of the Williamsburg bridge, though not formally declared such by the municipal authorities, comes within the jurisdiction of the comptroller and officers of the department of finance, under the provisions of § 151, *ante*, and is not within the jurisdiction of the commissioner of bridges. *Sorgen v. Prendergast*, 68 Misc. 189, 123 N. Y. Supp. 765.

Liability of the city of New York for injuries occasioned by snow and ice being blown from Brooklyn Bridge upon adjoining buildings. *Sadler v. City of New York*, 185 N. Y. 408, *aff'd* 104 App. Div. 82, 93 N. Y. Supp. 579, *rev'd* 40 Misc. 78, 81 N. Y. Supp. 308.

Additional powers of the commissioner of bridges. (New.)

§ 602. The commissioner of bridges, in addition to the powers hereinbefore conferred upon him, is also authorized, with the approval of the board of estimate and apportionment, given after ten days' notice in writing to the public service commission for the first district to select in the name and on the behalf of The City of New York any lands for approaches to bridges and sites therefor or lands above or under water for bridges or approaches thereto, and to acquire title thereto either in fee or to an easement as may be determined by the board of estimate and apportionment. The proceeding for the acquirement of the title to any property so selected shall be taken and conducted in the manner prescribed in chapter twenty-one of this act. (*Added by L. 1908, ch. 134.*)

Administrative jurisdiction; board; president; salaries. (See 3d Ed., p. 398.)

§ 607. The head of the department of parks shall be called the park board. Said board shall consist of four members who shall be known as commissioners of parks of The City of New York. They shall be appointed by the mayor and shall hold their respective offices as provided in chapter four of this act. One of said commissioners shall be the president of the board, and shall be so designated by the mayor. In appointing such commissioners, the mayor shall specify the borough or boroughs in which they are respectively to have administrative jurisdiction, to wit: one in the boroughs of Manhattan and Richmond; one in the borough of The Bronx, and one in the borough of Brooklyn and one in the borough of Queens. The principal office of the department of parks shall be in the borough of Manhattan. There shall be branch offices in the boroughs of Brooklyn, Queens, and The Bronx. The salary of each of said commissioners shall be five thousand dollars a year. (*As amended by L. 1911, ch. 644.*)

§ 610. General powers of the park board; ordinances. (See 3d Ed., p. 400.)

Ordinances restricting use of parks.

Under this section, the commissioner of public parks, has power by ordinance to restrict the height of vehicles using the park roads and parkways to ten feet; such ordinance is reasonable, in the absence of proof to contrary, and a company operating stages in a public park is subject to reasonable regulations of the department having jurisdiction over the parks. *People v. Shellenberg*, 133 App. Div. 79, 117 N. Y. Supp. 820.

The ordinance adopted by the park board providing that no automobile or other vehicle wearing chains over the tires of their wheels shall enter the public parks without the permission of the commissioner having jurisdiction held to be violative of the constitutional provision guaranteeing the equal protection of the laws to all persons and of the provisions of the Motor Vehicle Law regulating automobile traffic. *People ex rel. Anderson v. Flynn*, Davis, J., N. Y. Law Jour., Sept. 17th, 1908.

See *People ex rel. Cavanagh v. Waldo*, cited under § 612b, *post*.

General powers of commissioners as to the management of parks. (See 3d Ed., p. 401.)

§ 612. Subject to such general rules and regulations as shall be established by the board, each commissioner shall have charge of the management and be responsible for the care of all such parks, parkways, squares and public places as are situated in the borough or boroughs over which he has jurisdiction and of the streets and avenues

immediately adjoining the same; but such jurisdiction shall not extend to nor include the buildings which are now or may hereafter be erected in such parks, squares or public places for governmental purposes, other than those of the department of parks. It shall be the duty of each commissioner, subject to such general rules and regulations and in conformity therewith, to maintain the beauty and utility of all such parks, squares and public places as are situated within his jurisdiction, and to institute and execute all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city. Subject to the general rules and regulations established by the board, and excepting as otherwise provided in section six hundred and twelve-a of this charter, each commissioner shall have power to authorize and regulate the projections on and determine the line or curb and the surface construction of all streets and avenues lying within any park, square or public place in his jurisdiction, or within a distance of three hundred and fifty feet from the outer boundaries thereof; and he shall also have power to plant trees and to construct, erect and establish seats, drinking fountains, statues and works of art, when he may deem it tasteful or appropriate so to do, on any part of the public streets and avenues within such environments, subject to the provisions of title two of this chapter, and to determine when and where new lamps or lighting appliances shall be placed and lighted. (*As amended by L. 1908, ch. 135, § 1.*)

Purposes for which parks may be used.

The commissioner of public parks under the provisions of this section has power to permit the erection of temporary stands along parkways, etc., for persons to view a parade, and where no appropriation is available for the erection of such stands, he may delegate the right to erect the same to such persons and organizations, as he deems peculiarly interested in the celebration. *Epstein v. Smith*, 121 N. Y. Supp. '854.

The commissioner of parks having granted a five years' privilege at an annual rental to sell refreshments, etc., and renting boats at certain buildings in a public park, will be enjoined from removing the lessee from the buildings and demolishing the same, it appearing that the removal or demolition of the buildings has not been ordered in good faith and for the purpose of enabling the commissioner of parks to execute a plan in development of the park system which has been determined upon, and is about to be executed. *Gredinger v. Higgins*, 139 App. Div. 606, 124 N. Y. Supp. 22.

See cases cited under § 610, *ante*, and § 612b, *post*.

Streets adjoining parks.

The park commissioner has no power to grant to an abutting owner on a street lying within three hundred feet of a public park the right to erect an

ornamental wall eight feet in height which encroaches six or seven feet beyond the building line. Such a structure is a nuisance, and its maintenance will be enjoined upon suit by the city. *City of New York v. Rice*, 56 Misc. 360, 107 N. Y. Supp. 641, aff'd 128 App. Div. 903, 112 N. Y. Supp. 1124, aff'd 198 N. Y. 124.

The ordinance authorizing the construction of bay windows projecting three feet beyond the building line, *held* invalid. Neither the board of aldermen nor the park commissioners have the power to authorize encroachments upon the street. *William v. Silverman Const. Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945.

The park commissioner may be compelled by mandamus to remove encroachments on Riverside Drive, i. e., buildings erected beyond the building line of the driveway as a public nuisance. *People ex rel. Ackerman v. Stover*, 138 App. Div. 237, 122 N. Y. Supp. 1030.

See cases cited under § 50, *ante*.

Transfer of jurisdiction over certain streets in borough of Brooklyn from park department to president of borough. (New.)

§ 612a. The following named streets, avenues and highways in the borough of Brooklyn, which have heretofore been by law under the jurisdiction of the department of parks of the county of Kings or of the City of Brooklyn, and later under the department of parks of the City of New York and the commissioner of parks of the boroughs of Brooklyn and Queens, shall be under the exclusive care, custody and control of the president of the borough of Brooklyn, to wit: Riverdale avenue from Stone avenue to New Lots road, New Lots road to Dumont avenue and Dumont avenue to Fountain avenue. (Added by L. 1908, ch. 135, § 2.)

Ocean boulevard; restrictions as to use of. (New.)

§ 612b. The commissioner of parks of the boroughs of Brooklyn and Queens is hereby authorized, in his discretion by rules and regulations, to restrict the use and occupation of the main drive of Ocean boulevard in the borough of Brooklyn, from Twenty-second avenue to King's highway, to horses and light carriages and to exclude therefrom vehicles of all other kinds, including bicycles and motor vehicles. (Added by L. 1910, ch. 681.)

Laws 1910, ch. 681, which added this section to the Greater New York Charter, is not unconstitutional as diverting public property to the benefit of private individuals, nor does it come within the condemnation of the Fourteenth Amendment of the Federal Constitution which provides that no state shall deny to any person within its jurisdiction the equal protection of the

laws. The act is valid as a police regulation. *People ex rel. Cavanagh v. Waldo*, 72 Misc. 416, 131 N. Y. Supp. 307.

One who violates an ordinance passed by the park commissioner pursuant to the power conferred by this section restricting the main driveway or Ocean Boulevard, Borough of Brooklyn, from 22d Avenue to Kings Highway to horses and light carriages, and excluding vehicles of all other kinds including bicycles and motor vehicles, by driving an automobile alongside Boulevard between the points, is liable to arrest under § 610, *ante*, which makes the violation of the park ordinance a misdemeanor. *People ex rel. Cavanagh v. Waldo*, 72 Misc. 416, 131 N. Y. Supp. 307.

General powers of commissioners of parks under former acts.

(See 3d Ed., p. 405.)

§ 616. The park board shall in addition to the powers, rights and duties expressly conferred or imposed upon it by this act, except as otherwise provided by section six hundred and twelve-a, possess and exercise all the powers, rights, and duties and shall be subject to all the obligations heretofore vested in, conferred upon or required of the corporation known as the mayor, aldermen and commonalty of the City of New York, or the department of parks in said city, or the commissioners of parks, or in any other board, body or officer therein or thereof, or any commission, commissioner, body, board or officer in or for the county of Richmond, or the corporation known as the City of Brooklyn, or the department of parks in and for said city, or the commissioners of parks, or any commission, commissioner, body, board or officer of said city or of the county of Kings, or any commissioner, body, board or officer in or for the county of Queens, so far as such powers, rights, duties and obligations concerned or affected the control, care, management, government, extension, maintenance or administrative jurisdiction of the parks, squares and other public places situated or lying within the City of New York as constituted by this act or which have since been or may hereafter be opened or established therein, so far as the same are not inconsistent with this act. Nothing contained in this section shall be construed to limit the administrative control of the several commissioners over the parks, squares or public places situated or lying within their respective jurisdiction. (*As amended by L. 1908, ch. 135, § 3.*)

Riverside Drive is under the jurisdiction and control of the park department. *People v. Shellenberg*, 133 App. Div. 79, 117 N. Y. Supp. 820.

Additional powers of commissioners of park relative to care of Broadway. (New.)

§ 628. Subject to such general rules and regulations as shall be es-

tablished by the board, the commissioner of parks for the boroughs of Manhattan and Richmond shall have charge of the management and be responsible for the care of all that portion of Broadway (formerly the Boulevard) between Fifty-ninth street and One Hundred and Sixty-eighth street in the borough of Manhattan, which includes the plots or spaces along the center line thereof, commonly known as parkways. It shall be his duty, subject to such general rules and regulations and in conformity therewith, to maintain the beauty and utility of such plots or spaces and to institute and execute all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city and he shall have power to plant trees and to construct, erect and establish thereon seats, where he may deem it tasteful or appropriate so to do, and to determine when and where new lamps or lighting appliances shall be placed and lighted. The board of estimate and apportionment shall annually include and appropriate in the budget of The City of New York a sum which shall be sufficient, in its judgment, for the management and care of such plots, and for the purpose of paying the expenses for the year nineteen hundred and eight for the putting and keeping in good condition and caring for said plots, the board of estimate and apportionment may without the concurrence or approval of any other board or officer of The City of New York, authorize the issue of special revenue bonds for such amount as may be necessary for said purposes. It is further provided that such issue of revenue bonds shall not be deemed to be included in the amount authorized to be issued by the board of estimate and apportionment by virtue of section one hundred and eighty-eight, subdivision eight, of the revised Greater New York charter. Nothing in this act shall be construed to confer any jurisdiction over any street or avenue immediately adjoining said plots or spaces, or within a distance of three hundred and fifty feet from the outer boundaries thereof. Nothing in this act contained shall impair any rights which the city of New York may have against the rapid transit contractors, growing out of the construction of the subway, in said Broadway, relative to the replacing of trees and grass plots. (*As amended by L. 1908, ch. 106.*)

Public recreation commission; how constituted. (New.)

§ 629. The mayor shall have power, in his discretion, to constitute and appoint a public recreation commission for The City of New York, to include in its membership the president of the park board, a representative of the board of education and five citizens, appointed by the mayor, such appointments to be for a term of five years, except that in the first instance the appointments shall be for the term of

five, four, three, two and one years respectively. The members of the commission shall elect a president from among their own number, shall have authority to employ a secretary and such other officers, agents, attendants, directors and laborers as may be deemed necessary, the salary or compensation of whom may be provided by the board of estimate and apportionment. The members of the commission appointed by the mayor shall serve without compensation. (*Added by L. 1911, ch. 563.*)

§ 630. Powers of the commission. (New.)

The commission shall have supervision and control over:

(a) All playgrounds, playground fixtures and other recreational properties placed under its charge;

(b) All grounds or properties hereafter obtained by the city either through purchase, gift or loan for playground or recreational use;

(c) The acquisition by lease or gift of private properties to be used for playground purposes, provided that there shall be no expenditure of city funds upon the equipment or administration without the consent of the board of estimate to the securing of such properties and its approval of the terms by which they are taken;

(d) All gifts made to the city for recreational purposes of which it shall make full and complete annual financial statement to the comptroller, including an accounting of receipts and disbursements of all private or city funds under its control;

(e) Rules and regulations for the administration of all properties under its control. (*Added by L. 1911, ch. 563.*)

§ 631. Temporary use of property by commission; purchase of grounds, etc. (New.)

The sinking fund commission may assign to the recreation commission for temporary use any properties it may deem suitable for recreation purposes, provided that upon one month's written notice from the sinking fund commission, the said property shall be returned to the full control of the sinking fund commission.

All matters relating to recreation brought before the board of estimate and apportionment, including the proposed purchase of grounds or properties for recreation use, shall be referred to the recreation commission for report before final action. (*Added by L. 1911, ch. 563.*)

Art commission; how constituted. (See 3d Ed., p. 411.)

§ 633. There shall be an art commission for the city of New York composed as follows:

1. The mayor of the city of New York, ex officio.
2. The president of the Metropolitan museum of art, ex officio.
3. The president of the New York public library (Astor, Lenox and Tilden foundations), ex officio.
4. The president of the Brooklyn institute of arts and sciences, ex officio.

One painter, one sculptor, and one architect, all residents of The City of New York; and three other residents of said city, none of whom shall be a painter, sculptor or architect or member of any other profession in the fine arts. All of the six last mentioned shall be appointed by the mayor from a list, of not less than three times the number to be appointed, proposed by the fine arts federation of New York. In all matters of which such commission takes cognizance pertaining to work under the special charge of a commissioner or department, the commissioner having such special charge shall act as a member of the commission. Each of the aforesaid presidents may appoint a trustee of the institution or corporation of which he is president to serve in his place as ex officio member of said commission. Such appointment shall be in writing and shall be revocable at any time by such president. It shall terminate whenever he ceases to be president. Until the appointment be so revoked or terminated, any trustee so appointed shall be an ex officio member of said commission with like powers and duties as the president who has appointed him. (*As amended by L. 1907, ch. 675.*)

All works of art to be submitted to and approved by art commission. (See 3d Ed., p. 412.)

§ 637. Hereafter no work of art shall become the property of the city of New York, by purchase, gift or otherwise, unless such work of art or a design of the same, together with the proposed location of such work of art, shall first have been submitted to and approved by the commission; nor shall such work of art until so approved be contracted for, erected or placed in or upon, or allowed to extend over or upon any street, avenue, square, common, park, public building, or other public place belonging to the city. The commission may, when they deem proper, also require a complete model of the proposed work of art to be submitted. The term "work of art" as used in this title shall apply to and include all paintings, mural decorations, stained glass, statues, bas reliefs or other sculptures; monuments, fountains, arches, or other structures of a permanent character intended for ornament or commemoration. No existing work of art in the possession of the city shall be removed, relocated or altered in any way without the similar approval of the commission, except

as provided in section six hundred and thirty-nine of this act. The commission shall act in a similar capacity, with similar powers, in respect of the designs of buildings, bridges, approaches, gates, fences, lamps or other structures erected or to be erected upon land belonging to the city, and in respect to the lines, grades and plotting of public ways and grounds and in respect of arches, bridges, structures and approaches which are the property of any corporation or private individual, and which shall extend over or upon any street, avenue, highway, park or public place belonging to the city, and said commission shall so act and its approval shall be required for every such structure which shall hereafter be erected or contracted for; except that in case of any such structure which shall hereafter be erected or contracted for at a total expense not exceeding two hundred and fifty thousand dollars, the approval of said commission shall not be required, if the mayor or the board of aldermen shall request said commission not to act. But this section shall not be construed as intended to impair the power of the park board to refuse its consent to the erection or acceptance of public monuments or memorials or other works of any sort within any park, square or public place in the city. (*As amended by L. 1907, ch. 675.*)

Commissioner of public charities; rules and regulations; subordinate officers. (See 3d Ed., p. 415.)

§ 659. The said commissioner shall have power to establish general rules and regulations for the administration of the department and the government of the institutions under its jurisdiction except the institutions specified in section six hundred and sixty-one of this act, and except as provided in title two of this chapter, and such general rules and regulations shall be so far as practicable uniform in all the boroughs. The commissioner shall have power to appoint and in his discretion to remove not more than three deputies, to be known as first deputy, second deputy, and third deputy, and shall define their duties. The first deputy shall during the absence or disability of the commissioner possess all the powers and perform all the duties of the commissioner except the power of making appointments. In the absence or disability of both the commissioner and the first deputy, the second deputy shall possess all the powers and perform all the duties of the commissioner, except the power of making appointments. In the absence or disability of the commissioner and the first and second deputies, the third deputy shall possess all the powers and perform all the duties of the commissioner, except the power of making appointments. The commissioner, within the limits of his appropriation, shall have power to appoint and remove subject to the

requirements of the civil service laws such subordinate officers and assistants as may be necessary for the efficient performance of their duties as said commissioner. (*As amended by L. 1910, ch. 330.*)

§ 662. Powers of the commissioner as to destitute and dependent persons. (See 3d Ed., p. 417.)

The city is not liable for the tortious acts or neglects of its departments of police, fire, education or charity, or of any official or employee thereof. The departments are not agencies of the city, but public agencies, i. e., those created by law for the discharge of governmental, i. e., state duties, and not city duties or business; and therefore the rule *respondet superior* does not apply to the city in respect of them. *Gaetjens v. City of New York*, 132 N. Y. Div. 394, 116 N. Y. Supp. 759.

This section imposes upon the commissioner of public charities the duty of taking proper measures for the determination of the question of the insanity of persons who are committed to custody. Accordingly the city is liable for the compensation of a physician employed as an examiner in lunacy without the knowledge and consent of the commissioner of charities. *Stroger v. City of New York*, 110 App. Div. 188, 96 N. Y. Supp. 1083.

Terms of commitment of children to institutions; discharge. (See 3d Ed., p. 421.)

§ 667. The term of commitment of each child committed to the city of New York, as constituted by this act, under any of the provisions of sections six hundred and sixty-four, six hundred and sixty-five, and six hundred and sixty-six of this act shall be until such child shall attain the age of sixteen years or until it shall be duly indentured or placed out as an apprentice by the institution to which it shall have been committed or until it shall be given over in adoption by said institution to some suitable person, or until returned to its parents, relatives, or guardians, or otherwise discharged, except that such child may be committed to an institution caring for orphans of like religious belief and giving it manual or industrial training until it shall attain the age of eighteen years, provided the board of charities shall certify that the equipment and training of such institution are sufficient and satisfactory. Each institution mentioned in section six hundred and sixty-one of this act, shall submit to the commissioner at the end of every three months a list of the children referred to in sections six hundred and sixty-one, six hundred and sixty-four, six hundred and sixty-five and six hundred and sixty-six of this act, received by or discharged from said institution during the month, which list shall contain the names and

dence of the parents and guardians of the children as far as known.
Every such institution shall keep a book in which it shall cause to be
~~entered the names of the children who are committed to its custody~~

with one or more sureties, approved by the magistrate, to that effect.
Said magistrate shall have full power and authority to administer
the oath to said principal and surety in said undertaking as to the
truth of the statements therein and any justification or statement

requirements of the civil service laws such subordinate officers and assistants as may be necessary for the efficient performance of his

~~Classification and instruction of inmates of public institutions.~~

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children without adequate support or in danger of becoming a burden upon the public, or who shall have abandoned his wife and children, or either, in any other place and is found in the city of New York when his wife and children, or either, are residents thereof and are without adequate support, or in danger of becoming a burden upon the public, or who, by reason of his conduct, or of his cruel or inhuman treatment, or by reason of his neglect or refusal to provide for his wife and children, or either, with the necessities of life, renders it unsafe, improper or impossible for them to live with him, by reason of which they are without adequate support, or in danger of becoming a burden upon the public, is hereby declared a disorderly person.

Upon a complaint made under oath to him against a person as being disorderly, a city magistrate presiding in the domestic relations court for the boroughs of Manhattan and the Bronx and the borough of Brooklyn, and in the other boroughs of the city of New York to a city magistrate thereof presiding in any city magistrate's court therein may issue a warrant for the arrest of the defendant, or, in his discretion, a summons in the form prescribed by section eighty-two of chapter six hundred and fifty-nine of the laws of nineteen hundred and ten, said summons to be served as by said magistrate directed, including mail service, and who, upon his arrest or appearance, shall be arraigned in the manner provided by law. No warrant or summons shall be issued except upon the application of the commissioner of public charities, unless for good cause shown the magistrate may issue same if in his discretion he deems it proper so to do.

And if thereupon it shall appear by the confession of the defendant or by competent testimony that he is a disorderly person, the said magistrate shall make an order specifying a fair and reasonable sum of money, according to his financial ability, to be paid weekly for the space of one year thereafter by such defendant to the commissioner of public charities for the support of his wife or children, or either of them, and may require him to give security by a written undertaking with one or more sureties, approved by the magistrate, to that effect. Said magistrate shall have full power and authority to administer the oath to said principal and surety in said undertaking as to the truth of the statements therein and any justification or statement

§ 686. Commitments in abandonment proceedings; bonds, surety. (See 3d Ed., p. 430.)

Mode of proving due execution of a bond given under this section. *Tully v. Lewitz*, 50 Misc. 350, 98 N. Y. Supp. 829.

The absence of a seal does not invalidate a bond given under this section. *Tully v. Lewitz*, 50 Misc. 350, 98 N. Y. Supp. 829.

A bond is not invalidated because of the misdescription of the officer to whom the weekly payments therein provided for were required to be made. So *held*, where the bond provided the payments to be made to the commissioner of charities of the borough whose office had been superseded by that of commissioner of charities of the city. *Tully v. Lewitz*, 50 Misc. 350, 98 N. Y. Supp. 829.

The giving of a bond under this section does not preclude an appeal under § 689, *post*, from an order under § 685. *People v. Cobucci*, 68 Misc. 46, 124 N. Y. Supp. 891.

Actions on bonds in abandonment proceedings. (See 3d Ed., p. 430.)

§ 687. Any suit, action or proceeding brought or instituted upon any bond or recognizance given in pursuance of the preceding section shall be brought and prosecuted by and in the name of the commissioner of public charities and in said suit, action or proceeding it shall not be necessary to prove the actual payment of money by the commissioner of public charities but the neglect to pay the sum ordered to be paid by competent authority for the support of the wife or children shall be a breach of the undertaking and the measure of damages shall be the sum ordered to be paid and which was withheld at the time of the commencement of the action with interest thereon; after the recovery of damages or the commencement of an action, another action may, in the same manner be brought for further breach of the undertaking, and all moneys recovered in any suit, action or proceeding shall be paid to the commissioner to be by him applied and expended for the support of the wife and children, or either or any of them, of the person against whom the order mentioned and provided for in section six hundred and eighty-five of this act shall have been made. Provided, however, that a surety on an undertaking given to secure the payment of money for the support of the wife or children or both may at any time surrender the defendant to the court or magistrate who made the final order, who shall hold him subject to the final order until another bond or undertaking is given as in said final order provided, and said surety shall be relieved

of record in said counties, respectively, in an action of debt in favor of the commissioner aforesaid. The amount recovered on said undertaking or bond and judgment aforesaid shall be applied and expended for the support of the wife and children, or either or any of them, of the person charged with the offenses hereinbefore recited or either or any of such offenses, and when any money has been deposited instead of bail and which shall have been forfeited as hereinbefore provided, said money shall be paid to the commissioner, by the person with whom the said sum of money is deposited, upon presenting to him a certificate from the city magistrate who made the order of forfeiture certifying to the forfeiture thereof, which said certificate shall state the name of the person making the deposit, when it is made, the name of the defendant, and that the said sum of money was forfeited on account of the defendant's failure to appear as directed, and shall be signed by said magistrate. (*As amended by L. 1912, ch. 418.*)

**Orders and commitments in abandonment proceedings;
surety.**

§ 686. If the undertaking be given, the defendant must be discharged. But if not, the city magistrate must convict him as a disorderly person and must make up, sign with his title of office, and file in the office of the clerk of the county in which such conviction is had, a record of the conviction of such offender as a disorderly person, specifying generally the nature and circumstances of the offense and the name of the witnesses by whom it has been established, and shall by a warrant of commitment signed by him with his title of office commit the defendant to the city of New York, and to the place where the

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Actions on undertakings in abandonment proceedings.

§ 687. Every action brought upon any undertaking given in an abandonment proceeding shall be brought in the name of the commissioner of public charities and in such action it shall not be necessary to prove the actual payment of money by the commissioner of public charities, but the neglect to pay the sum ordered to be paid by competent authority for the support of the wife or children shall

whom the order provided for in section six hundred and eighty-five of this act shall have been made and provided, however, that a surety

Recoveries in abandonment, neglect to provide, relieve and maintain proceedings.

§ 688. Upon the forfeiture of an undertaking or bond given in an abandonment or neglect to support proceeding as provided in the foregoing sections, the corporation counsel of the city of New York, acting for and in behalf of the commissioner of public charities of said city, shall cause to be filed in the office of the clerk of the respective counties of the city of New York in which said undertaking or bond may have been taken said undertaking or bond, together with a certified copy of the order of the court forfeiting the same, and thereupon the said clerk shall docket the same in the book kept by him for the docketing of judgments, transcripts whereof are filed with him as such clerk, as if the same was the transcript of a judgment directed for the amount of the penalty, and the undertaking or bond and a certified copy of the order forfeiting the same shall be the judgment record; such judgment shall in good faith be a lien on the real estate of the persons entering into such undertaking or bond against the estate of the persons entering into such undertaking or bond, from the time of filing said undertaking or bond and a copy of the order and docketing the same, as in this section directed; an execution may be issued to collect the amount of said undertaking or bond in the same form as upon a judgment recovered in any court of record in said counties, respectively, in an action of debt in favor of the commissioner aforesaid. The amount recovered on said undertaking or bond and judgment aforesaid shall be applied and expended for the support of the wife and children, or either or any of them, of the person charged with the offenses hereinbefore recited or either or any of such offenses, and when any money has been deposited instead of bail and which shall have been forfeited as hereinbefore provided, said money shall be paid to the commissioner, by the person with whom the said sum of money is deposited, upon presenting to him a certificate from the city magistrate who made the order of forfeiture certifying to the forfeiture thereof, which said certificate shall state the name of the person making the deposit, when it is made, the name of the defendant, and that the said sum of money was forfeited on account of the defendant's failure to appear as directed, and shall be signed by said magistrate. (As amended by L. 1912, ch. 418.)

of any damages upon the undertaking except the sum ordered to be paid and which was withheld at the time of such surrender with interest thereon. If the person charged with the offenses hereinbefore recited or either of them is admitted to bail, the undertaking of his bail shall be for the future appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the commissioner a specified sum in the event of such failure to appear or if such person deposits a sum of money as directed by law instead of giving an undertaking of bail for his future appearance, and if such person shall thereafter fail to appear in accordance with the terms of said undertaking or the terms upon which the money was deposited, then the said magistrate shall enter the fact of said person's nonappearance upon the minutes and the undertaking of his bail or money deposited instead of bail shall thereupon be forfeited. (*As amended by L. 1908, ch. 357, § 1.*)

In an action on a bond given under this section as amended by L. 1908, ch. 357, the determination of the magistrate with respect to the amount required for the support of the wife and children is not open to inquiry, although the payment by the husband of the full amount required by the magistrate and as required, would be a complete defense to an action on the bond, and payment in part would be a partial defense. *Hebbard v. Levin*, 145 App. Div. 416, 129 N. Y. Supp. 1088, mod'g 68 Misc. 311, 123 N. Y. Supp. 1022; *Drummond v. McGarry*, 72 Misc. 341, 130 N. Y. Supp. 160.

The bond given for the support of a wife and children by a delinquent husband under the provisions of this section, prior to its amendment by L. 1908, ch. 357, was one of indemnity and the surety thereon could not be held without proof that the husband has continued to neglect his marital duties and that the support of his family has in fact been a charge upon the public treasury. *Goetting v. Normoyle*, 191 N. Y. 368, aff'g 119 App. Div. 143, 103 N. Y. Supp. 881. Compare *Hebbard v. Levin*, 68 Misc. 311, 123 N. Y. Supp. 1022, mod'f'd 145 App. Div. 416, 129 N. Y. Supp. 1088, and *Drummond v. McGarry*, 72 Misc. 341, 130 N. Y. Supp. 160.

Recoveries in abandonment proceedings. (See 3d Ed., p. 431.)

§ 688. When such a bail bond or undertaking is forfeited, an action may be brought in the name of the commissioner of public charities to recover the amount specified in such bail bond or undertaking in which the measure of damages shall be the full amount mentioned in said undertaking and the amount recovered in said action shall be applied and expended for the support of the wife and children, or either or any of them, of the person charged with the offenses hereinbefore recited or either or any of such offenses and when any money

has been deposited instead of bail and which shall have been forfeited as hereinbefore provided, said money shall be paid to the commissioner, by the person with whom the said sum of money is deposited, upon presenting to him a certificate from the city magistrate certifying to the forfeiture thereof, which said certificate shall state the name of the person making the deposit, when it is made, the name of the defendant, and that the said sum of money was forfeited on account of the defendant's failure to appear as directed and shall be signed by said magistrate. (*As amended by L. 1908, ch. 357, § 2.*)

§ 689. Appeals in abandonment proceedings; costs. (See 3d Ed., p. 432.)

An appeal may be taken under this section from an order made under § 685, *ante*, although a bond has been given under § 686. *People v. Cobucci*, 68 Misc. 46, 124 N. Y. Supp. 891.

An appeal will not lie to the court of general sessions unless taken within sixty days after the commitment of the defendant. *People v. Steinhart, Rosalsky, J.*, N. Y. Law Jour., December 18th, 1907.

An appeal will not lie to the court of general sessions unless a written undertaking be given by the defendant with such sureties as the court may approve so that the defendant will abide the judgment of the court, upon the appeal and will pay all costs which may be awarded against him. *People v. Steinhart, Rosalsky, J.*, N. Y. Law Jour., December 18th, 1907.

This section makes it mandatory upon the judge hearing the appeal to give \$30 costs to the appellant upon reversal and \$25 costs to the respondent upon affirmance. *People v. Steinhart, Rosalsky, J.*, N. Y. Law Jour., December 18th, 1907.

§ 690. When new security be required after conviction in abandonment proceedings. (See 3d Ed., p. 434.)

The language of this section requires the magistrate, upon proof that a recovery was had upon the bond given by a defendant upon conviction pursuant to § 686, *ante*, to issue the warrant prescribed in this section and to require the defendant to give new security as therein provided. That proof would ordinarily be sufficient by the production of a transcript of judgment accompanied by the affidavit of the person who is personally familiar with the action taken on the bond setting forth in detail the action taken upon the bond, and a new information need not be lodged against the defendant in the manner required when the proceedings were originally instituted. *Greenbaum, J.*, in *People ex rel. Hibbard v. Walsh*, 54 Misc. 9, 105 N. Y. Supp. 367.

Establishment of day nurseries. (New.)

§ 691a. The commissioner of charities, with the approval of the

has been deposited instead of bail and which shall have been forfeited
provided said money shall be paid to the commis-

Appeals in abandonment proceedings ; costs.

§ 689. An appeal to the court of general sessions may be taken from a conviction before a city magistrate under this chapter within the county of New York, or to the county court in any other county within the city of New York, which said appeal shall be conducted in accordance with the provisions of the code of criminal procedure of the state of New York, except that the judge allowing the appeal must take from the defendant a written undertaking in such sum and with such sureties as he may approve, that defendant will abide the judgment of the appellate court upon the appeal, and will pay all costs which may be awarded against him, and except that all notices required by said code of criminal procedure to be served upon the district attorney upon such appeal shall be served upon the commissioner of public charities, and the commissioner may appear by counsel upon the hearing of such appeal.

The court, in its discretion, may award costs to the party in whose favor the appeal is determined, as follows: To the appellant upon reversal, thirty dollars; to the respondent upon affirmance, twenty-five dollars. When awarded to the appellant they must be paid by the controller of The City of New York, upon the delivery to him of a certified copy of the order of reversal, and must be charged to the contingent account fund of the commissioner of public charities. When awarded to the respondent the payment may be enforced as in a civil action, and in an action brought therefor against the sureties upon the undertaking given on the allowance of the appeal, the production of a certified copy of the order of affirmance shall be conclusive evidence. If a new trial be ordered it must be had in the court from which the appeal was taken.

An appeal to the court of general sessions may be taken in an abandonment proceeding on behalf of the complainant by the commissioner of public charities in his own name, from a decision or judgment of a city magistrate under this chapter, within the county of New York; or to the county court in any other county which is wholly or partly within The City of New York, as constituted by this act.

For the purpose of appealing the commissioner must within sixty days after such decision or judgment make an affidavit reciting the alleged errors in the proceeding in which the decision or judgment was rendered, and must within that time present to the county judge of the county where the proceeding was brought or to a justice of the supreme court in that department, and apply thereon for an allowance of the appeal.

If, in the opinion of the judge or justice to whom the affidavit is submitted, it is proper that the questions set forth in the affidavit should be decided by the appellate court, the judge or justice must endorse upon the affidavit an allowance of an appeal to the court to which the appeal may be taken as aforesaid and the commissioner must within five days thereafter serve a copy of such affidavit upon which the appeal was granted, together with a notice that the same has been allowed, upon the defendant in the abandonment proceeding or upon the attorney or counsel who last appeared for the defendant therein.

Sections seven hundred and fifty-five, seven hundred and fifty-six, seven hundred and fifty-seven and seven hundred and fifty-eight of the code of criminal procedure shall apply to the appeal herein provided.

The appeal may be brought to argument by the commissioner or the defendant upon ten days' notice to the opposite party, to be served personally on the commissioner, or, either personally upon the defendant or personally upon the attorney who last appeared for the defendant.

The appeal shall be heard and disposed of in the manner provided by sections seven hundred and sixty-three, seven hundred and sixty-four, seven hundred and sixty-five, seven hundred and sixty-six and seven hundred and sixty-nine of the code of criminal procedure, except that if a new trial be ordered it shall be had in the court from which the appeal was taken, and, pending such new trial, the judge shall issue a warrant for the arrest of the defendant, and may hold him to bail as upon an indictment.

If the judgment on the appeal be against the complainant, the commissioner may appeal therefrom to the appellate division of the supreme court in the same manner as a defendant.

Upon an appeal taken by the commissioner of public charities no costs shall be awarded to either party. (As amended by L. 1912, ch. 401.)

board of estimate and apportionment, may, in his discretion, establish one or more day nurseries, and may adopt rules and regulations for the free admission thereto of children under ten years of age. If authorized by the board of estimate and apportionment, he may select and cause to be acquired therefor, in the name and on behalf of the city of New York, in the manner provided by chapter twenty-one of this act, the land, together with the buildings thereon, situated at the northwest corner of Tenth avenue and Fiftieth street, in the borough of Manhattan, City of New York, which premises are known as five hundred and one West Fiftieth street, together with such other land and buildings situated in the city of New York as he may deem needed therefor, and the acquisition of which the board of estimate and apportionment shall approve. (*Added by L. 1911, ch. 69.*)

§ 692. Board of trustees of Bellevue and allied hospitals; powers and duties. (See 3d Ed., p. 435.)

Employees of board.

The board of trustees have power to appoint the employees mentioned in this section subject to civil service rules, but the board of aldermen have exclusive power under § 56, *supra*, to fix the salary, and the trustees have then the power to fill the office. *People ex rel. Barton v. Brannon*, 141 App. Div. 295, 126 N. Y. Supp. 47, rev'g 69 Misc. 38, 125 N. Y. Supp. 691.

The board of trustees under this section have power to appoint employees of hospitals, but the board of aldermen have exclusive power under § 56, *ante*, to fix the salary. *People ex rel. Barton v. Brannon*, 141 App. Div. 295, 126 N. Y. Supp. 47, rev'g 69 Misc. 38, 125 N. Y. Supp. 691.

Contracts by board.

See *Williams v. City of New York*, cited under § 419, *ante*.

Board of inebriety. (New.)

§ 693. 1. The board of estimate and apportionment of the city of New York may by resolution determine that there shall be in the said city a board of inebriety. When the board of estimate and apportionment shall have so determined by resolution the mayor of the city of New York shall appoint in the manner hereinafter provided a board of inebriety. This board shall consist of seven members, five of whom, hereinafter known as the appointive members, shall be appointed by the mayor, and two of whom shall be physicians. The commissioner of public charities and the commissioner of correction shall be ex-officio members of the said board. One of the appointive members of the board shall be appointed for one year, one for two years, one for three years, one for four years, and one for five years.

Upon the expiration of the term of office of a member of the board, the mayor shall appoint his successor for the term of five years. The mayor shall fill any vacancy in the board caused by the death or removal from the city of a member other than the commissioner of public charities and the commissioner of correction, by the appointment of a person for the remainder of the term of such member. The members of the board shall serve without pay. No member shall be interested directly or indirectly in the furnishing or performing of work, labor, services, materials or supplies of any kind to or for the board. (*Added by L. 1910, ch. 551.*)

2. In appointing members of the board of inebriety, the mayor shall call upon the president or other executive head of each of the following organizations: The United Hebrew Charities of the city of New York, the Particular Councils of New York and Brooklyn of the Society of Saint Vincent de Paul, the New York Association for Improving the Condition of the Poor, and the Brooklyn Bureau of Charities to present a list of not less than twice the number of persons to be appointed members of said board of inebriety, to fill a vacancy or otherwise. Notice in writing of the dates on which appointments, including the first, to the board are proposed to be made shall be given by the mayor to each of said presidents or other executive heads at least ten days prior thereto, and such list of names shall be so presented within ten days after the receipt of such notice. Said presidents or other executive heads may each submit, or two or more of them may jointly present, such a list of names. Appointments to the board may, in the discretion of the mayor, be made from such list or lists. (*Added by L. 1910, ch. 551.*)

3. The board shall appoint a chief executive officer who shall be its secretary, and shall appoint such number of field officers, clerks and other employees, as its work may require and as the board of estimate and apportionment may authorize. It shall exercise general control over the work of such secretary, field officers, clerks and other employees. (*Added by L. 1910, ch. 551.*)

4. The board shall maintain a central office for the boroughs of Manhattan and The Bronx, and a central office for the boroughs of Richmond, Brooklyn and Queens, each of which offices shall be always open, Sundays and holidays included. It shall maintain at each such office a central bureau of records of males arrested for public intoxication within the boroughs assigned to such office. (*Added by L. 1910, ch. 551.*)

5. The board shall, with the approval of the board of estimate and apportionment, acquire by purchase or condemnation a site, suitable for a hospital and industrial colony for the care and treatment of

inebriates and shall establish, equip and maintain a hospital and industrial colony thereon. The hospital and industrial colony may be within or without the city of New York. It shall provide for the care, treatment and occupation of inebriates in accordance with methods approved by medical science. If the hospital and industrial colony be located without the city the board may, with the approval of the board of estimate and apportionment, establish a reception hospital within the city. (*Added by L. 1910, ch. 551.*)

6. Whenever, after the board of inebriety shall have been appointed and shall have certified in writing to the mayor that the hospital and industrial colony of said board is ready to receive inmates, a male person shall be arrested for public intoxication, the fact of such arrest and the name and address of the person arrested, if it can readily be ascertained, shall be reported forthwith by telephone or otherwise to the office of the board for the borough in which the arrest is made by the person in charge of the station house to which the arrested person is taken. The board shall thereupon cause an investigation to be made by one of its field officers, concerning the person so arrested, ascertaining as far as may be possible the name, the address, the persons, if any, dependent upon him for support, his place of employment, if any, whether previously arrested for public intoxication, and if so, how many times, consulting as a part of such investigation the central bureau of records of arrests for public intoxication. If the investigation shows that the person has not been arrested for public intoxication so far as can be ascertained for the period of twelve months next preceding, the field officer shall, when the arrested person shall have recovered sufficiently from his intoxication, inform him that he may sign a request for his immediate release, addressed to the court having jurisdiction. Such request shall give the name and address of the arrested person and shall set forth what persons, if any, are dependent upon him for support, his place of employment, if any, and shall state that he has not been arrested for public intoxication within the twelve months next preceding. If such a request be signed, the field officer shall so inform the officer in charge of the place of custody of the arrested person and such officer shall thereupon release the person forthwith. The field officer shall, for the use of the court having jurisdiction of the case, transmit to said court such application, together with a report of the results of the investigation of the case made by said field officer. Such report shall contain such information as shall have been gathered by the field officer, together with a statement of the sources of such information. In case a field officer discovers that a person arrested for public intoxication has been arrested within the twelve months next preceding, he shall report

the results of his investigation to the court having jurisdiction of the case. (*As amended by L. 1911, ch. 682.*)

7. After the board of inebriety shall have been appointed and shall have certified in writing to the mayor that the hospital and industrial colony of said board is ready to receive inmates, any male person who is a resident of the city of New York and who is adjudged by a court of record to be an inebriate may, upon his own application or upon the petition of a relative or of the commissioner of public charities or of the board of trustees of Bellevue and allied hospitals, and upon the certificate of two medical examiners in lunacy, be committed by such court to the board for a period of not less than one year nor more than three years. The provisions of law relating to the commitment of insane persons shall, so far as may be practicable, apply to the commitment of persons as inebriates under this subdivision of this section. For the purposes of this section, an inebriate shall be a person who is incapable of properly conducting himself or his affairs, or is dangerous to himself or others, by reason of habits of periodical, frequent or constant drunkenness, induced either by the use of alcoholic or other liquors, or of opium, morphine or other narcotic or intoxicating or stupefying substance. (*As amended by L. 1911, ch. 682.*)

8. Any person who shall bring, or cause to be brought, any intoxicating liquor or narcotic drugs upon premises used by the board for patients committed to it, except upon the written order of the superintendent of such institution, or who shall furnish any patient in any institution maintained by the board any intoxicating liquor or narcotic drugs, except upon the written order of a physician who is a member of the medical staff of the institution, shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by imprisonment for not less than thirty days nor more than one year or by a fine of not less than fifty dollars nor more than five hundred dollars. (*Added by L. 1910, ch. 551.*)

9. The board may parole upon such terms as it may deem wise any person committed to its care and receiving treatment in its hospital and industrial colony whenever in its judgment such course would be wise. The person so paroled shall remain under the supervision of a field officer of the board, until the board considers that such person may safely be released from its supervision, or until the expiration of the maximum term for which such person was committed to its care. A field officer of the board, upon a warrant issued by the president and secretary of the board, shall arrest and return to the custody of the board any person paroled from such hospital and industrial colony, who shall have violated the terms of such parole. Such arrested person shall, in the discretion of the board, be re-

turned to the hospital and industrial colony for inebriates, or taken before the court which committed such person to the board, whereupon application shall be made by said board to said court for the commitment of such person as provided in subdivision ten thereof. The board may discharge any person committed to it whenever in its judgment such person may safely be released from its supervision. (*Added by L. 1910, ch. 551.*)

10. The board may apply to the court which committed any person to said board to release it from further care and custody of such person. Such application shall set forth facts tending to show that said person, either because of infraction of the rules and regulations of the board, or because of violation of the terms of his parole, or for other reasons, is an unsuitable person for further treatment in the hospital and industrial colony of the said board or under its supervision. The court may thereupon release said board from further custody and care of such person, and may make such other disposition of such person as may be authorized by law. (*Added by L. 1910, ch. 551.*)

11. The board of inebriety shall collect money for the maintenance of any person committed to it, if said person, upon investigation, be found able to pay in whole or in part for his maintenance. The amount so collected shall in no case exceed the per capita per diem expense of maintaining patients in the hospital and industrial colony of said board. (*Added by L. 1910, ch. 551.*)

Board of ambulance service. (New.)

§ 693a. 1. The commissioner of police, the commissioner of public charities, the president of the board of trustees of Bellevue and allied hospitals and two citizens appointed by the mayor, shall constitute a board, which shall be known as the "Board of ambulance service." The commissioner of police shall be the president of the board; the commissioner of public charities shall be the secretary thereof. The board may appoint such employees within the limits of the appropriation made therefor as it may find necessary in the performance of its duties. Said board shall:

Exercise general control over and establish rules and regulations governing all ambulance service in the city of New York, except such ambulance service as shall be maintained by the department of health.

Establish ambulance districts from time to time and alter the boundaries of such districts.

Enter into a contract in writing with any hospital corporation desiring to maintain an ambulance service, which contract shall define the obligations assumed by said hospital corporation, on condition

that the ambulance district defined therein be assigned to it by the board, and reserving to the board the authority to terminate a contract, if, in their judgment, a satisfactory ambulance service is not maintained at all times by the said hospital.

Establish and maintain an ambulance service in any district where, in the judgment of the board, is inadequately provided with an ambulance service, when means shall have been provided therefor by the board of estimate and apportionment.

Provide for the reception of all calls for ambulance service in any locality in the city of New York, notify the hospital maintaining an ambulance service in the district from which the call is received, and, in case said hospital has no available ambulance, notify the nearest hospital having an ambulance available. Said board shall keep a record of all such calls and of their assignment by it.

2. Subject to the control of the board of ambulance service, the commissioner of public charities and the board of trustees of Bell and allied hospitals shall maintain an ambulance service in connection with each hospital under their respective jurisdictions whenever, in their judgment it is desirable so to do. (*Added by L. 1909, ch. 395*)

Institutions under the jurisdiction of the commissioner of correction. (See 3d Ed., p. 441.)

§ 695. The commissioner shall have jurisdiction over and it shall be his duty to take charge of and manage all institutions for the care and custody of criminals and misdemeanants which belong to the city and shall be hereafter acquired by the city of New York, except the house of refuge, the house of detention of witnesses, the Brooklyn disciplinary training school for boys, incorporated societies for the prevention of cruelty to children and such places for the detention of prisoners or persons charged with crime as are by law placed under the charge of some other department, board or officer. The buildings now used as jails in the county of Kings are hereby placed under the control and authority of the commissioner; and all prisoners other than those detained by civil process, who by law are committed to the custody of the sheriff of Kings county, are hereby placed in the custody of the commissioner. The commissioner shall have power to transfer prisoners from any prison under his control to any other prison under the jurisdiction of the department of correction; and it shall be his duty of taking, transferring and transporting all prisoners under the order or mandate of all courts and judges thereof, before and after conviction and sentence, to and from the various courts and jails in said county, and to and from all other institutions now or hereafter that may hereafter be under the control or jurisdiction of the said

department, in said county and city, is hereby imposed upon said commissioner; and all persons who are employed as van drivers at the time this act shall take effect are hereby transferred to the department of correction; and the custody of all horses, vans and harness now in the control or custody of the sheriff is transferred to the department of correction. The commissioners of the sinking fund shall, as provided in section two hundred and five, designate and set aside any portion of these buildings or any other suitable buildings as com-

that the ambulance district defined therein be assigned to it by the board, and reserving to the board the authority to terminate such contract, if, in their judgment, a satisfactory ambulance service is not maintained at all times by the said hospital.

Establish and maintain an ambulance service in any district which, in the judgment of the board, is inadequately provided with ambulance service, when means shall have been provided therefor by the board of estimate and apportionment.

Institutions under the jurisdiction of the commissioner of correction.

§ 695. The commissioner shall have jurisdiction over and it shall be his duty to take charge of and manage all institutions for the care and custody of criminals and misdemeanants which belong to or shall be hereafter acquired by the city of New York except the house of refuge, the house of detention of witnesses, the Brooklyn disciplinary training school for boys, incorporated societies for the prevention of cruelty to children and such places for the detention of prisoners or persons charged with crime as are by law placed under the charge of some other department, board or officer. The buildings now used as jails in the counties of Kings and Queens are hereby placed under the control and authority of the commissioner; and all prisoners other than those detained by civil process, who by *laws

orderly who on the first day of January, nineteen hundred and twelve, was, in accordance with the provisions of law, employed as such in and about such county jails, and who shall continue to be so employed at the time of the transfer of said jails to the department of correction of the city of New York by virtue of this section; and who shall prior thereto have successfully passed a civil service examination under the civil service law in accordance with the rules and regulations prepared by the municipal or state civil service commissioner, shall be retained and assigned to perform the same service in the same institution in which they are employed at the time the department of correction shall have assumed control and the management of the buildings now used as jails in the counties of Kings and Queens. The commissioner shall also have charge of such other institutions belonging to the city as have been or may be hereafter placed under his jurisdiction by the board of aldermen. Whenever the state authorities shall have caused the inmates of the lunatic asylum on Hart's island to be removed elsewhere and shall have vacated the buildings now on said island occupied by said asylum, the said buildings, with the grounds thereto appertaining, shall become and be under the charge and control of the department of correction; provided, however, that the burial of deceased paupers shall be continued on said island under regulations established by the joint action of the department of public charities and of correction, or in case of disagreement between said departments, under such regulations as may be established by the mayor of the city.

department, in said county and city, is hereby imposed upon said commissioner; and all persons who are employed as van drivers at the time this act shall take effect are hereby transferred to the department of correction; and the custody of all horses, vans and harness now in the control or custody of the sheriff is transferred to the department of correction. The commissioners of the sinking fund shall, as provided in section two hundred and five, designate and set aside any portion of these buildings or any other suitable buildings as common jails for the accommodation of prisoners detained by civil process held in the custody of the sheriff, and such portions of buildings or other suitable buildings so designated and set aside shall be and remain under the separate control of the sheriff of the county aforesaid. Each and every warden, deputy warden, jail-keeper, matron, cook, laundress, cleaner and bookkeeper, who on the first day of January, nineteen hundred and seven, was, in accordance with the provisions of law, employed as such in and about the Kings county jails, and who shall continue to be so employed at the time of the transfer of said jails to the department of correction of the city of New York by virtue of this section; and who shall prior thereto have successfully passed a civil service examination under the civil service law in accordance with the rules and regulations prepared by the municipal civil service commissioner, shall be retained and assigned to perform the same service in the same institution in which they are employed at the time the department of correction shall have assumed control and the management of the buildings now used as jails in the county of Kings. The commissioner shall also have charge of such other institutions belonging to the city as have been or may be hereafter placed under his jurisdiction by the board of aldermen. Whenever the state authorities shall have caused the inmates of the lunatic asylum on Hart's Island to be removed elsewhere and shall have vacated the buildings now on said island occupied by said asylum, the said buildings, with the grounds thereto appertaining, shall become and be under the charge and control of the department of corrections; provided, however, that the burial of deceased paupers shall be continued on said island under regulations established by the joint action of the department of public charities and of correction, or in case of disagreement between said departments, under such regulations as may be established by the mayor of the city. (*As amended by L. 1909, ch. 381.*)

The temporary appointment of a person to act as watchman in the Brooklyn Disciplinary School for Boys to meet an emergency created by the fact that the eligible list for that position has been exhausted, is not in violation

of the Civil Service Law. *Gallagher v. City of New York*, 115 App. Div. 662, 101 N. Y. Supp. 229.

§ 698. Classification of criminals and misdemeanants. (See 3d Ed., p. 443.)

Repealed by Inferior Criminal Courts Act, L. 1910, ch. 659, § 120.

§ 707. Commitment of persons convicted of public intoxication, disorderly conduct or vagrancy. (See 3d Ed., p. 449.)

Repealed by Inferior Criminal Courts Act, L. 1910, ch. 659, § 120.

§ 707a. Commitments to State Reformatory for Women at Bedford. (See 3d Ed., p. 453.)

Repealed by Inferior Criminal Courts Act, L. 1910, ch. 659, § 120.

§ 708. Superintendent of the workhouse; reports. (See 3d Ed., p. 454.)

Repealed by Inferior Criminal Courts Act, L. 1910, ch. 659, § 120.

§ 710. Time of discharge; how to be ascertained. (See 3d Ed., p. 455.)

Repealed by Inferior Criminal Courts Act, L. 1910, ch. 659, § 120.

§ 711. Discharge of

maintenance and direction of the several buildings and premises, and bell-towers, and property, and appurtenances thereto, and all apparatus, hose, implements, and tools of any and all kinds which may belong to or be in the use of the said department. Whenever any horses used in the fire department, the police department or the street cleaning department, shall have become unfit for use therein, the commissioner of either of such departments, instead of causing such horses to be sold at auction, as provided by section fifteen hundred and fifty-three, may transfer such horses to the custody of the American Society for the Prevention of Cruelty to Animals, providing such society is willing to accept the custody thereof, to be disposed of in such manner as the said society may deem best. If, however, any horse so received into the custody of said society and formerly used in the fire department or the police department shall thereafter be sold by said society, or any profit be derived from its use, the proceeds from such sale or use shall be paid over by said society to the fire commissioner or to the police commissioner, for the benefit of the pension fund of their respective departments; and if any horse formerly used in the department of street cleaning shall be sold or used by said society, the proceeds of such sale or use, shall be the property of the city of New York, and shall be paid over by said society to the chamberlain of the city. The fire commissioner, the police commissioner, and the street cleaning commissioner, may, however, transfer any horse or horses which have been condemned, or which may be hereafter condemned as unfit for service in said departments, respectively, to any other department of the city of New York, at such price for each horse as may represent the average price received per horse at the auction sales of such condemned horses, conducted by the department making such transfer during the last two years preceding such transfer in which such auction sales were held. (*As amended by L. 1908, ch. 356, § 1.*)

Bureaus. (See 3d Ed., p. 466.)

§ 727. The fire commissioner shall have power to organize the fire department into such bureaus as may be convenient and necessary for the performance of the duties imposed upon him. There shall be in the department a fire bureau, which under the direction of the commissioner shall have charge of the extinguishment of fires and the necessary and incidental protection of property in connection therewith. There shall also be established a bureau of fire prevention, which under the direction of the commissioner shall perform the duties and exercise the powers in relation to the prevention of fires devolved upon the commissioner by this act or by any other

law or ordinance. The official in charge of the bureau of fire prevention shall be known as the chief of the bureau of fire prevention and shall be appointed by the commissioner. The commissioner shall also appoint such other officials and subordinates in each borough as may be necessary. (*As amended by L. 1911, ch. 899.*)

Selection of subordinates. (See 3d Ed., p. 467.)

§ 728. The fire commissioner shall have power to select heads of bureaus and assistants and as many officers and firemen as may be necessary, and they shall at all times be under the control of the fire commissioner, and shall perform such duties as may be assigned to them by him, under such names or titles as he may confer. Promotions of officers and members of the force shall be made by the fire commissioner as provided in section one hundred and twenty-four of this act on the basis of seniority, meritorious service in the department and superior capacity as shown by competitive examination. Individual acts of personal bravery may be treated as an element of meritorious service in such examination, the relative rating therefor to be fixed by the municipal civil service commission. The fire commissioner shall transmit to the municipal civil service commission in advance of such examination the complete record of each candidate for promotion. (*Added by L. 1911, ch. 899.*)

Promotion of firemen.

Rule 15 of the municipal civil service rules providing that those taking examinations for promotion "shall have served with fidelity for not less than six months, in positions of the same group or general character, in the grade next lower, in the same department, *held*, valid and an application for mandamus to compel the admission of an assistant foreman of the fire department to an examination for promotion before he had served six months in his present grade, denied. *Matter of Ricketts*, 111 App. Div. 669, 98 N. Y. Supp. 502. See also cases cited under § 288, *ante*.

§ 729. Location of fire alarm, telegraph, etc. (See 3d Ed. p. 467.)

The fire commissioner has the power to permit the Manhattan Fire Alarm Company to connect its wires with the city fire alarm telegraph system, so as to communicate an alarm of fire directly to fire headquarters, instead of compelling notice to be given by pulling the signal in the fire alarm box in the usual way. *Foy v. City of New York*, 144 App. Div. 892, 129 N. Y. Supp. 72.

Qualifications of force of fire department. (See 3d Ed., p. 471.)

§ 734. No person shall be appointed to membership in the fire de-

partment or continue to hold membership therein, who is not a citizen of the United States, or who has ever been convicted of felony; nor shall any person be appointed who cannot read and write understandingly the English language, or who shall not have resided within the state one year immediately prior to his appointment, or who is not over the age of twenty-one and under the age of thirty years, except that after a person's name is placed on the eligible list, he may be appointed while his name continues on the same list, although meanwhile he may have attained such age. Every member of the uniformed force shall reside within the limits of the city of New York. Preliminary to a permanent appointment as firemen there shall be a period of probation for such time as is fixed by the civil service rules, and no person shall receive a permanent appointment who has not served the required probationary period, but the service during probation shall be deemed to be service in the uniformed force if succeeded by a permanent appointment, and as such shall be included and counted in determining eligibility for advancement, promotion, retirement and pension, as hereinafter provided. (*As amended by L. 1907, ch. 602.*)

§ 739. Discipline of fire department, etc. (See 3d Ed., p. 473.)

Procedure.

Where the record of the proceeding shows that the relator, although tried on two charges, was found guilty upon the second and that the first was dismissed, it is immaterial that the order of dismissal from the force states that he was found guilty on both charges, for it is a harmless clerical error. *People ex rel. Dailey v. O'Brien*, 125 App. Div. 202, 109 N. Y. Supp. 64.

Cause for removal.

Dismissal of a fireman for participating in an agreement to procure the promotion of a fellow fireman, held sustained by the evidence. *People ex rel. Dailey v. O'Brien*, 125 App. Div. 202, 109 N. Y. Supp. 64.

The removal of a member of the fire department for violation of its rules and regulations, in that he was guilty of deception and evasion in failing to truthfully inform the deputy chief of the department, of the true state of

favor of his innocence that would exist if the charge had been made in a criminal court, and upon review of his dismissal on *certiorari* the question presented was whether on the same evidence, a verdict of a jury against him if rendered in a criminal trial for perjury, would be set aside as not warranted by the evidence. *People ex rel. Madigan v. Sturgis*, 110 App. Div. 1, 96 N. Y. Supp. 1046.

See cases cited under § 300, *ante*.

Grades, ranks and salaries of officers and members of the uniformed force. (See 3d Ed., p. 477.)

§ 740. The rank and salaries of officers of the fire department shall be as follows:

Chief of department, whose annual salary shall be not more than six thousand dollars; deputy chiefs of department, whose annual salary shall not be more than four thousand two hundred dollars; battalion chiefs, whose annual salary shall be not more than three thousand three hundred dollars; medical officers, whose rank and salary shall be the same as that of battalion chiefs, one of whom shall be appointed chief medical officer, whose annual salary shall be not more than six thousand dollars; captains or foremen of companies, whose annual salary shall be not more than two thousand one hundred and sixty dollars; lieutenants or assistant foremen of companies, whose annual salaries shall be not more than eighteen hundred dollars; pilots of fireboats who shall continue to receive annual salaries as now provided for by law; engineers of steamers, whose annual salaries shall be one thousand six hundred dollars.

From and after January first, eighteen hundred and ninety-eight, the uniformed members of the fire department who are firemen shall be divided into four grades, to wit, first, second, third and fourth, and shall receive an annual pay or compensation as follows: members of the first grade, fourteen hundred dollars; members of the second grade, twelve hundred dollars; members of the third grade, one thousand dollars; members of the fourth grade, eight hundred dollars. The members of the uniformed force who are appointed after January first, eighteen hundred and ninety-eight, shall be assigned to the fourth grade; after one year of service in the fourth grade they shall be advanced to the third grade; after one year of service in the third grade, they shall be advanced to the second grade; after one year of service in the second grade, they shall be advanced to the first grade, and they shall in each instance receive the annual pay or compensation of the grade to which they belong as herein provided. All persons who, when this act takes effect, are firemen in the uniformed force of the fire department of the corporation heretofore known as the mayor, aldermen and commonalty

of the city of New York, or of the city of Brooklyn, or the corporation heretofore known as Long Island City, shall thereupon become firemen of that grade having a salary thereto attached equal to the salary or compensation paid such firemen, respectively, at the time of the taking effect of this act; provided, however, that any such fireman who has been a member of the uniformed force in the city of Brooklyn, or in Long Island City, whose salary falls between any two of the grades hereby established shall within three years have his salary made equal to the salary of the first grade by equal annual additions. Nothing in this section contained shall be construed to change in any way the salaries or grading, present or prospective, of the firemen who are or shall become members of the uniformed force of the New York fire department prior to January first, eighteen hundred and ninety-eight; and nothing in this section contained shall be construed to affect in any other way than as provided herein the rights and privileges secured under the provisions of this act to uniformed members of the various fire departments consolidated into one department by this act. The pay or compensation of the officers of the fire department and each of them mentioned in the first paragraph of this section, and also the pay or compensation of district engineers and officers ranking as such, and of any other officers who, when this act takes effect, belong to the uniformed force of either of the fire departments hereby consolidated into one department, shall be and remain fixed at the amount which they and each of them were severally receiving or entitled to receive from the respective municipal corporations in whose employ they were prior to the taking effect of this act; provided, however, that the salaries of all such officers in either of said fire departments other than the New York department, so consolidated into one department, shall be made equal to the salaries of corresponding officers in said New York department within three years from January first, eighteen hundred and ninety-eight, by equal annual additions; and provided further that if the difference in the pay received by such officers and the pay received by corresponding officers of the New York fire department as heretofore existing, is not more than fifty dollars, when this act takes effect, the pay shall be equalized at once.

The pay or compensation aforesaid shall be paid monthly to each person entitled thereto, subject to such deductions each month from the pay or compensation of said persons as are or shall be authorized by law or by this act; and no pay or compensation shall be allowed or paid to any such fireman or officer, except as in this section provided for and declared, any other law to the contrary or otherwise notwithstanding. (*As amended by L. 1911, ch. 392.*)

A pilot of a fireboat was appointed in 1887 when by § 442 of the N. Y. City Consolidation Act (L. 1882, ch. 410) the maximum salary of a member of the uniformed force after four years' service was \$1,000; he was paid, however, \$1,200 a year and subsequently his salary was increased to \$1,500, he being designated as an ununiformed pilot, and never having taken the oath of office of members of the uniformed force. L. 1907, ch. 547, amended this section by adding to the uniformed force "pilots of fireboats who shall continue to receive annual salaries as now provided by law." *Held* that the pilot on his retirement for physical disability was entitled to a pension of \$500 yearly and not to a pension of half his former salary, to which he would have been entitled if he had served for twenty years as a member of the uniformed force, as he only became a member of the uniformed force in 1907. *Matter of Roche*, 141 App. Div. 872, 126 N. Y. Supp. 766.

Auxiliary fire alarm systems. (New.)

§ 743. All persons, partnerships or corporations engaged in the maintenance and operation of auxiliary fire alarm telegraph systems from which rent, profit or compensation is derived, and which are connected with the fire alarm telegraph system maintained by The City of New York or who for the benefit of their patrons are permitted to make any use whatsoever of the service of said fire alarm telegraph system shall pay such reasonable compensation to The City of New York for such privilege and for such period of time as shall be fixed by the board of estimate and apportionment on the recommendation of the fire commissioner. (*Added by L. 1910, ch. 544.*)

§ 748. Right of way of fire department; obstructing. (See 3d Ed., p. 481.)

The provisions of this section giving to the insurance patrol the right of way over all vehicles except those carrying the United States mail and making it a misdemeanor to refuse such right of way, are not in violation of the constitution. *Duffghe v. Metropolitan St. R. Co.*, 109 App. Div. 603, 96 N. Y. Supp. 334.

It is the duty of the driver or motorman of a street car to accord to an insurance patrol, the right of way if he had opportunity to do so. *Duffghe v. Metropolitan St. R. Co.*, 109 App. Div. 603, 96 N. Y. Supp. 334.

A regulation adopted by the police commissioner under § 315, *ante*, prescribing the side of the street to be used by vehicles moving in a given direction is not applicable to the officers and employees of the fire department when engaged in the performance of duties requiring the exercise of haste for the public safety. *People v. Mahoney*, 65 Misc. 449, 121 N. Y. Supp. 898.

§ 762. Lights; precautions against fire and use of aisles in places of amusement. (See 3d Ed., p. 487.)

Not repealed by Building Code.

This section was not repealed by § 1620, *post*, subd. 3, which repeals specified sections mentioned in the second schedule annexed to the act, including § 762, upon the passing of certain ordinances by the board of aldermen, by the circumstance that the board of aldermen did pass §§ 102 and 109 of the Building Code, as the latter are of limited scope and not intended as a substitute for the more comprehensive provisions of this section, giving the fire commissioner power to require owners to install safeguards against fire in certain classes of structures. *Waldo v. Christman*, 72 Misc. 349, 130 N. Y. Supp. 260.

Installation of fire extinguishing apparatus.

The provisions of this section empowering the fire commissioner in his discretion to order specific individuals to install facilities for protection against fire, is not unconstitutional, because it is not a general rule applying to all who are similarly situated. *Waldo v. Christman*, 72 Misc. 349, 130 N. Y. Supp. 260.

The fire commissioner has the power to issue an order directing the owner of a building enumerated in this section, to install therein lines of perforated pipe to connect with valves to be placed on the outside of the building. Such perforated pipe constitutes a "means of preventing and extinguishing fires." *Lantry v. Hoffman*, 55 Misc. 261, 105 N. Y. Supp. 353, *aff'd* on opinion below, 124 App. Div. 937, 109 N. Y. Supp. 1134.

An owner of a building is not justified in failing to comply with an order requiring him to install certain fire extinguishing apparatus in the building, because the premises are in the possession of a tenant who has covenanted during the term of the lease to comply promptly with all laws, orders and regulations of the state and municipal authorities. Notwithstanding the terms of the lease, the owner had the right to enter upon the premises for the purpose of complying with the order of the fire commissioner, and if the tenant was obligated by the lease to comply with the order and neglected to do so, he would be bound after notice to reimburse the owner for the expenses incurred. *Lantry v. Hoffman*, 55 Misc. 261, 105 N. Y. Supp. 353, *aff'd* on opinion below, 124 App. Div. 937, 109 N. Y. Supp. 1134.

The fire commissioner has no jurisdiction of the structural parts of a building having no connection with fire or heating apparatus, and is not authorized to order the owner of a building to cover a wooden dumbwaiter shaft with asbestos and metal. *Lantry v. Mede*, 127 App. Div. 557, 111 N. Y. Supp. 833, *rev'g* 58 Misc. 221, 108 N. Y. Supp. 1099.

Aisles and passageways of theaters, etc.

"While a statute that imposes a penalty must be strictly construed, a

statute such as this, which is designed to protect the lives of the patrons of the place from the dangers of panic in case of fire or other sudden disaster, by securing an unimpeded means of exit, should be rigidly enforced, and the courts will not strive to find technicalities whereby its beneficent purposes may be defeated." *Waldo v. Seelig*, 70 Misc. 254, 126 N. Y. Supp. 798.

Where the only entrance to the main or orchestral floor of a theater was through a center door, and persons entering this door were compelled to pass behind the row of seats to gain the aisle on either side of said floor, the space in the rear of the seats is within the "aisles and passageways" of this section; and where in the gallery, the only way a person can pass from one side to the other, without going down stairs and crossing on the main floor and ascending the stairs, is by the passageway back of the seats, the space back of the seats is also within the "passageways" of this section. *Waldo v. Seelig*, 70 Misc. 254, 126 N. Y. Supp. 798.

It is not necessary that the fireman should give notice to the licensee or proprietor of the theater in order that the penalty provided by this section may be incurred; the knowledge of his agents and servants is his knowledge. *Waldo v. Seelig*, 70 Misc. 254, 126 N. Y. Supp. 798.

Duties of fire commissioner. (New.)

§ 774. The commissioner shall enforce all laws and ordinances in respect of

1. The prevention of fires;
2. The storage, sale, transportation or use of combustibles, chemicals, and explosives;
3. The installation and maintenance of automatic or other fire-alarm systems and fire-extinguishing equipment;
4. The means and adequacy of exit, in case of fire, from all buildings, structures, enclosures, vessels, places and premises in which numbers of persons work, live, or congregate from time to time for any purpose except tenement-houses;
5. The investigation of the cause, circumstances and origin of fires and the suppression of arson. (*Added by L. 1911, ch. 899.*)

Fire drills in certain structures.

§ 775-a. The fire commissioner is empowered to make and enforce such general regulations or special orders as he may deem necessary respecting the regular and periodical performance of a fire drill in any factory, store or other business establishment, or in any school, hospital, infirmary, asylum or other charitable or eleemosynary institution, within the city of New York. The term "fire drill," as used in this section, shall be construed to mean any instruction or practice in the use of means of egress and of alarm or fire-extinguishing equipment, which the fire commissioner may prescribe by general regulation or special order. (*As amended by L. 1912, ch. 458.*)

premises, or any part thereof, or thing therein or attached thereto, to be examined and inspected by any officer or employee of the department designated for such purpose;

2. Order, in writing, the remedying of any condition found to exist in, on or about any building, structure, enclosure, vessel, place or premises, except tenement-houses, in violation of any law or ordinance in respect to fires or to the prevention of fires, except the tenement-house law;

3. Require, in writing, the installation, as prescribed by any law or ordinance, in any building, structure or enclosure of automatic or other fire-alarm system or fire-extinguishing equipment and the maintenance and repair thereof, or the construction, as prescribed by any law or ordinance, of adequate and safe means of exit;

4. Require any building, structure, enclosure, vessel, place or premises, which, in the opinion of the commissioner, is inadequately protected against fire perils to be vacated, or to be condemned and removed;

5. Cause any vessel moored to or anchored near any dock or pier in the city to be removed to and secured at such place in the harbor as shall be designated by the commissioner, provided such vessel shall be on fire or in danger of catching fire or is, by reason of its condition, or the nature of its cargo, a menace to shipping or to property or the water front of the city;

6. Cause any order of the commissioner or department which is not complied with within the time fixed in the order for such compliance to be enforced and to take proceedings for the enforcement thereof.

The commissioner or any authorized officer or employee of the department may enter, at any reasonable hour, any building, structure, enclosure, vessel, place or premises, or any part thereof, to make inspections or in furtherance of the purpose of any provision of this chapter.

Orders of the department or of the fire commissioner shall be addressed to the owner or owners, lessees or occupants of the building, structure, enclosure, vessel, place or premises affected thereby, but it shall not be necessary to designate such owner or owners, lessees or occupants by name in any such order, but the premises shall be designated in the address, so that the same may be readily identified. Service of any such order may be made by delivery of a copy thereof to the owner or any one of several owners, to a lessee or any one of several lessees, or to any person of suitable age and discretion in charge or apparently in charge of the premises, or if no person be found in charge of the premises then by affixing a

Fire hazards are nuisances; procedure to abate same.

§ 776. Any building, structure, enclosure, vessel, place or premises which is perilous to life or to property in case of fire therein, thereon or adjacent thereto, by reason of the nature or condition of its contents, or its use, or the overcrowding at any time of persons therein, or defects in its construction, or deficiencies in such fire alarm or fire extinguishing equipment as may be required for, on, or in said building, structure, enclosure or premises, by law, or by ordinance, or order of the fire commissioner, is a nuisance within the meaning of this act, the penal law and the code of ordinances. The fire commissioner is empowered and directed to cause any such nuisance to be abated.

If the person or persons served with an order under the last pre-

provided, that nothing contained in this section shall authorize the commissioner to alter the construction of any building, structure, vessel, enclosure, place or premises, or to supply any deficiency in the fire-alarm, fire-extinguishing or fire-escape equipment thereof, but in any such case he may prohibit and prevent the occupancy and use of such building, structure, vessel, enclosure, place or premises or public access thereto for any purpose, until the order of the department in respect thereof is complied with. (*As amended by L. 1912, ch. 458.*)

or neglect on a person's part, shall not prevent the department from complying with any of the requirements thereof the department may execute such order with its own employees and equipment, or by the employment of other agencies, as the commissioner may direct, subject to the right of the owner, lessee or occupant of such building, structure, vessel, enclosure, place or premises to demand a survey thereof in respect of such order; provided, that nothing contained in this section shall be held to authorize the commissioner to supply any deficiency in the fire-alarm, fire-extinguishing or fire-escape equipment of any building, structure, vessel, enclosure, place or premises, but in any such case he may prohibit and prevent the occupancy or use of such building, structure, vessel, enclosure, place or premises or public access thereto for any purpose, until the order of the department in respect thereof is complied with. (*Added by L. 1911, ch. 899.*)

Reimbursement for expenses; procedure. (New.)

§ 776a. The expenses attending the execution of any and all orders duly made by the department shall respectively be a several and joint personal charge against each of the owners or part own-

- ers, and each of the lessees and occupants of the building, structure, vessel, enclosure, place or premises to which said order relates, and in respect of which said expenses were incurred; and also against every person or body who was by law or contract bound to do that in regard to such building, structure, vessel, enclosure, place or premises which said order requires, and said expenses shall also be a
- lien on all rent and compensation due, or to grow due, for the use of any building, structure, vessel, enclosure, place or premises, or any part thereof, to which said order relates, and in respect of which said expenses were incurred. (*Added by L. 1911, ch. 899.*)

Right to survey. (New.)

§ 777. The owner, lessee or occupant of any building, structure, vessel, enclosure, place or premises affected by any order of the department, or his agent, may make written demand upon the commissioner for a survey of such building, structure, vessel, enclosure, place or premises to determine whether or not such order is valid and reasonable, which demand for survey must be served upon the commissioner or one of his deputies, or a member of the uniformed force of the department, if personal service cannot be made upon the commissioner or one of his deputies, within forty-eight hours, Sundays and holidays excluded, after the service of the order referred to in such demand. A demand for survey served upon a deputy commissioner or a member of the uniformed force of the department shall be forthwith transmitted to the commissioner. Upon receipt of a demand for a survey the commissioner shall immediately issue an order for the same, naming therein three persons to act as surveyors, one of whom shall be an officer or an employee of the bureau of fire prevention or a member of the municipal explosives commission; another shall be an architect or builder of at least ten years' experience and the third a person to be chosen from a list to be furnished by the board of fire underwriters, or provided by the commissioner, with the approval of the mayor, in the event *of the board of fire underwriters shall not furnish such a list.

The date and hour when the survey shall be made shall be stated in the order therefor. A copy of such order shall be served upon the person demanding the survey at least twenty-four hours before the hour fixed in the order for the holding of such survey and he shall have the right to be present and be heard at the same in person, or by agent or attorney; provided that such copy of an order of survey may be served as provided generally in respect of service of orders

*So in original.

of the department, by section seven hundred and seventy-five of this act. (Added by L. 1922, ch. 100)

Survey; certiorari to review reports of.

§ 777-a. The surveyors shall meet at the time and place prescribed in the order of their appointment and shall survey the building, structure, vessel, enclosure, place or premises referred to in such order and consider the merits of the order of the department in respect of which the survey has been demanded. After such survey and consideration, the surveyors shall prepare and sign a report of their proceeding and determination, which shall be filed in the department and a copy thereof shall be given the person demanding such survey upon his application therefor. The determination of the surveyors in any such case shall be final and conclusive, except that it may be reviewed by a writ of certiorari, application for which shall be made in the county in which the building, structure, vessel, enclosure, place or premises affected by such determination shall be located, within ten days after filing the report of the survey in the department. The decision of the appellate division of the supreme

Expenses of surveys. (New.)

§ 777b. Each person, other than an officer or employee of the department designated to act as a surveyor, pursuant to the provisions of this article, shall be paid out of the contingent fund of the department the sum of twenty-five dollars for each survey in which he participates, upon the filing of the report thereof in the department. The city shall be entitled to reimbursements for all expenses incident to a survey under the provisions of this article, provided, in the report of the survey, it shall be held that the order of the commissioner, which was the subject of such survey, was in all respects valid and reasonable.

In case the demand for a survey is made by a lessee or occupant the commissioner may require, as a condition precedent to the ordering of a survey, that such lessee or occupant shall deposit with the department the sum of one hundred dollars to indemnify the city for the expenses of the survey, in the event the surveyors confirm the order of the department, which sum shall be returned to the depositor in the event the surveyors shall report such order is invalid or unreasonable. No demand for a survey by a lessee or occupant of a building, structure, enclosure, vessel, place or premises shall have any force or effect or be binding in any way upon the commissioner unless and until such deposit to indemnify the department for the expenses of the survey, if required, shall have been made.

The city may enforce reimbursement for the expenses of a survey against an owner of real property, who in person or by agent has demanded a survey in respect of an order of the department, and shall have a lien upon the property affected by such order in like manner and to the same extent as is provided in section seven hundred and seventy-six-a of this act. (*Added by L. 1911, ch. 899.*)

Application for order to remove violations and to vacate buildings. (New.)

§ 778. In case an order issued by the commissioner or the department is not complied with, or the commissioner certifies in writing that an emergency exists requiring such action, he may order any building or structure or part thereof to be vacated. Such order shall be addressed and served in the same manner as is prescribed in section seven hundred and seventy-five for the service of orders. Whenever any order to vacate served as aforesaid shall not have been complied with, within the time designated therein, the commissioner, in addition to or in lieu of the remedy last above provided, or of any other remedy or power, may apply to the supreme court, at a special term thereof, without notice, for an order directing the said commissioner to vacate such building or premises, or so much thereof as said commissioner may deem necessary, and prohibiting and enjoining all persons from using or occupying the same for any purpose until such measures are taken as may be required by such order. (*Added by L. 1911, ch. 899.*)

Transmitting notice to owners. (New.)

§ 778a. In case any order or notice mentioned in or given pursuant to any of the five last preceding sections shall be served upon or given to any lessee or person in possession or charge of the building, structure, enclosure, vessel, place or premises therein described it shall be the duty of such person to give immediate notice to the owner or agent of said building, structure, enclosure, vessel, place or premises named in the notice, if the same shall be known to such person personally, if such owner or agent shall be within the limits of the city of New York, and his residence known to such person; and if such owner or agent be not within said city, then by depositing a copy of such order or notice in any postoffice in the city of New York, properly enclosed and addressed to such owner or agent, at his then place of residence, if known, and with the postage prepaid. In case any lessee or person in possession or charge as aforesaid shall neglect to give such notice as herein provided, he shall be personally liable to the owner or owners of said building or premises

for all damages he or they shall sustain by reason of such neglect.
(*Added by L. 1911, ch. 899.*)

Investigation of fires. (New.)

§ 778b. The commissioner, through the chief of the bureau of fire prevention, a fire marshal, an assistant fire marshal or other officer of the department lawfully empowered to administer oaths and take testimony, shall investigate the origin of all fires, and particularly of all cases of supposed arson, incendiarism or fires due to criminal carelessness, which may be brought to the notice of the department or any officer thereof. The officer conducting such an investigation shall have power to summons under subpoena and take the testimony, in *writing and under oath, of all persons supposed to be cognizant of any fact or to have means of knowledge in respect of the origin and circumstances of any supposed arson, incendiarism or fire due to criminal carelessness. All such testimony, duly verified, with the report of the investigating officer, setting forth his opinion and conclusions in respect of the case, shall be transmitted to and filed in the department. A copy of such testimony and report may be furnished, in the discretion of the commissioner, to the New York board of fire underwriters, to the owners of property, or other persons interested, provided, that in all cases of supposed arson, incendiarism or fires due to criminal carelessness, the commissioner, or an officer of the department authorized by him, shall promptly seek the co-operation of the police department and the district attorney of the county in which the supposed crime shall have occurred, and in all such cases the commissioner shall cause the police commissioner and the district attorney to be furnished with copies of the testimony taken and reports made by officers of the department in respect of such supposed arson, incendiarism or fires due to criminal carelessness. All evidence, with the addresses of probable witnesses, in any such case shall be reported by the department to the appropriate district attorney without delay.
(*Added by L. 1911, ch. 899.*)

Municipal explosives commission. (New.)

§ 778c. The municipal explosives commission, as constituted at the date when this act shall take effect, is continued, and its members shall hold office during the pleasure of the mayor. All regulations of such commission approved by the fire commissioner, except such as relate exclusively to its organization, or to the duties and discipline of its officers and employees, shall constitute a chap-

* So in original.

ter of the code of ordinances of the city, and shall be subject to amendment or repeal by the board of aldermen. (*As amended by L. 1911, ch. 899.*)

§ 780. Fire marshals may enter buildings to examine them.
(See 3d Ed., p. 503.)

Limitation upon powers of fire marshal.

The scope of the powers of the fire marshal under this section is stated in *Lantry v. Mede*, 127 App. Div. 557, 111 N. Y. Supp. 833, aff'd 194 N. Y. 544, as follows: "He" (the fire marshal) "is given by the state no jurisdiction over the structural part of the building, however improperly constructed, but is authorized to examine the apparatus used for heating which is to include chimneys, flues and pipes with which the same may be connected, and also the engine rooms, boilers, ovens, kettles, and also all chemical apparatus. All these, however, relate to heating appliance or appliances to which heat is applied as distinct from the structural part of the building, and the chimneys, flues and pipes, which may be connected with the heating apparatus. He is also given jurisdiction over chemical apparatus which I suppose means all machinery or apparatus used for the manufacture or which has to do with the preparation of chemical substances. But it seems to me that stairways, elevator shafts, dumb waiter shafts and such other parts of the building proper having no relation to apparatus, or which are not in themselves 'things,' but rather a part of the building, are not included within this section."

Fire department relief fund; of what consists. (See 3d Ed., p. 506.)

§ 789. Subd. 10. There shall be paid to the treasurer of the veteran firemen's association of the north shore fire department of Staten Island, veteran and exempt volunteer firemen's association of the Edgewater fire department of Staten Island, New York, veteran volunteer firemen's association of Tottenville fire department, and the south shore veteran and exempt volunteer firemen's association, being exempt or veteran volunteer firemen's associations existing in the borough of Richmond at the time of the passage of this act, quarterly, by the comptroller of the city of New York for the benefit of said associations and without any action or authority of or from the board of estimate and apportionment:

a. Forty-five per centum annually of all proceeds of suits for penalties under title three of this chapter, which may be collected or paid in from the borough of Richmond, and of all license fees payable under the same which may be collected or paid in from the borough of Richmond.

b. Four and one-half per centum annually of all excise moneys

or license fees belonging to the city of New York, as constituted by this act, and derived or received by any commissioner of excise or public officer from the granting of license or permission to sell strong or spirituous liquors, ale, wine or beer in the borough of Richmond, under the provisions of any law of this state, authorizing the granting of any such licenses, or permission. Said moneys shall be apportioned by said comptroller among such exempt or veteran volunteer firemen's association in proportion to the actual bona fide membership of each such association on the first day of January next preceding the time when such apportionment is made. In determining the membership of such associations, only exempt or honorably discharged volunteer firemen shall be considered as members. (*As amended by L. 1907, ch. 639.*)

§ 790. Retiring members of fire department; pensions, etc.
(See 3d Ed., p. 510.)

A certificate of the medical officers on the application of a fireman for retirement after twenty years' service, showing that the applicant was totally unfit for the performance of fire duty, *held* not in compliance with this section, which requires that the certificate should state that he is unfit for the performance of any duty, it appearing that there were other and lighter duties for which he may be fitted. *People ex rel. Cunningham v. Hayes*, 66 Misc. 531, 122 N. Y. Supp. 104.

Where the certificate of the medical officers on the application of a fireman of the fire department showed that he was disabled for the performance of his duties, the commissioner must determine the circumstances thereof as to whether the disabilities were caused by injuries received in the service, after notice to applicant and opportunity to be heard. If caused in the performance of his duties, the applicant should be retained in the department in some position not requiring active fireman's service. *People ex rel. Cunningham v. Hayes*, 66 Misc. 531, 122 N. Y. Supp. 104.

Where the action of the fire commissioner in fixing the pension of a retired fireman at less than half his salary is attacked, the burden of proof is upon the fireman to show affirmatively that the condition of the pension fund warranted the allowance of a pension of half his salary. *Ramsay v. Hayes*, 187 N. Y. 367, rev'g 112 App. Div. 442, 98 N. Y. Supp. 394.

Mandamus is the appropriate remedy of a retired fireman who claims that he is aggrieved by the action of the commissioner in fixing his pension at less than half his salary. The determination of the commissioner cannot be reviewed in an action at law brought to recover the difference between half his salary and the pension as fixed. Nor, it seems will *certiorari* lie to review the action of the commissioner, in fixing the pension of a retired fireman, at

less than half his salary. *Ramsay v. Hayes*, 187 N. Y. 367, rev'g 112 App. Div. 442, 98 N. Y. Supp. 394.

Mandamus to require the fire commissioner to fix the relator's pension at the statutory rate, will not be denied for laches if the relator applied for the writ promptly on the dismissal of a prior action for the same relief in which it was determined that his proper remedy was mandamus. *Matter of Ramsay v. Lantry*, 123 App. Div. 71, 107 N. Y. Supp. 828.

See cases cited under §§ 354 and 355, *ante*.

Trustees of relief fund of fire department; when to pay pensions. (See 3d Ed., p. 513.)

§ 791. The trustee of the relief fund is authorized and empowered, from time to time, to pay a pension out of said relief fund to the widow, child or children or dependent parent or parents of any deceased officer or member of the uniformed force of the said fire department, if the death of such officer or member occur during his service in the said uniformed force, or after he was retired from service in the said uniformed force; provided, that the amount of any such pension to be paid by the said trustee to each of the several representatives of such officer or member as aforesaid, in case there shall be more than one, may be, from time to time, determined by the said trustee according to the circumstances of each case, and that such pension may be ordered to cease and terminate at any time if, in the opinion of the trustee, the circumstances should warrant the same; and further provided, that not more than three hundred dollars shall be paid in any one year to the representative or representatives of such officer or member, and that no part of such sum shall be paid to any such widow who shall marry again, after her remarriage, or to any child after it shall have reached the age of eighteen years. In case any officer or regular or probationary member of the uniformed force of said department was heretofore or is hereafter killed while actually engaged in the performance of duty, or if death ensues, or has heretofore ensued, or resulted in a disease which caused death, as the immediate effect of injuries received, the trustee of said relief fund shall have the power to award to the widow of such officer or member an annual allowance as a pension, to be paid out of the said relief fund, in an amount not to exceed, except as herein provided, one-half of the salary or compensation of such officer or member at the date of his decease, and in the case of a probationary member in an amount not to exceed one-half the salary or compensation of a fourth grade member. If in the case of any officer or any regular or probationary member of the uniformed force of said department, heretofore or hereafter killed while actually engaged

in the performance of duty, one-half of the salary or compensation of such officer or member at the date of his decease does not equal six hundred dollars, the trustee of such relief fund shall have the power to award to the widow of such officer or member an annual allowance as a pension, to be paid out of such relief fund, in an amount not to exceed six hundred dollars. If such officer or member dying leaves no widow surviving him, but leaves a child or children, under the age of eighteen years, or dependent parent or parents, the said trustee shall have the power to award to the legal guardian of such child or children, or dependent parent or parents, for its or their support and maintenance, an annual allowance out of said relief fund, in an amount not to exceed one-half of the salary or allowance of such officer or member at the date of the decease. The amount of such annual allowance to any widow shall not exceed the sum of one thousand dollars, and shall cease upon her death or remarriage, or if she shall have been guilty of conduct which, in the opinion of said trustee, renders further payment inexpedient. The amount of such annual allowance to any one such child, or dependent parent or parents, shall not exceed the sum of five hundred dollars, and in every case such payment shall cease upon the death or marriage of such child, or upon its reaching the age of eighteen years. If such payment to the widow of any such officer or member shall cease by reason of her death, remarriage or misconduct, the said trustee shall have power to make payments to the child or children, or dependent parent or parents of such officer or member, if any, as though he had died without leaving a widow surviving him. The widows and orphans and retired members of the Brooklyn fire department, or of any other fire department of any of the municipal and public corporations or parts thereof hereby consolidated, shall be entitled to receive from the fire department pension fund herein created the amounts which they would respectively have been legally entitled to receive on the thirty-first day of December, eighteen hundred and ninety-seven, from any fire department pension or relief fund heretofore existing in any of said municipal corporations or parts thereof. (*As amended by L. 1908, ch. 364.*)

Life insurance fund of fire department. (See 3d Ed., p. 514.)

§ 792. The life insurance fund shall consist of all moneys that are now to the credit of the New York fire department life insurance fund, and the Brooklyn fire department widows' and orphans' relief fund; and all persons who have paid into the said respective funds, and who shall continue to pay into the life insurance fund, shall receive the benefits of said fund as provided in this chapter.

There shall be deducted from the monthly pay of each officer and probationary fireman of said department, and from the monthly pension of retired members of said department, and from the pay of such other employees of said department as shall heretofore have availed themselves of this provision until, as hereinafter provided, the amount of said fund shall equal the sum of twenty-five thousand dollars, the monthly sum of one dollar, which shall be received and deposited by the treasurer of the relief fund to the credit of the New York fire department life insurance fund, in a bank or trust company to be selected by him and to continue to receive and deposit the funds applicable to the same to the credit of said fund. The said treasurer shall make a semi-annual report verified by him of the condition of said fund containing a statement of all receipts and disbursements for or on account of said fund, together with names of all beneficiaries and the amount paid to each, and file said report in the office of the comptroller. When the amount of such fund shall equal the sum of twenty-five thousand dollars, assessment shall only be made to maintain said fund at the said sum of twenty-five thousand dollars. In case of the death of any member or employee of said department in the service thereof, who has availed himself of this provision, or of any pensioned or retired member of said department, and so contributing, there shall be paid to the widow, or, if there be no widow, then to the legal representatives of such deceased member, or employee, or pensioned and retired member, the sum of one thousand dollars out of the moneys so assessed; and in case, by reason of the number of deaths, the aggregate amount of money so provided to be assessed and collected should prove inadequate to make such payment, then the assessment may, in the discretion of said trustee, be increased to not exceeding the sum of two dollars in each month's pay or each month's pension of pensioned and retired members of said department. None but members of the uniformed force and probationary firemen shall hereafter be eligible to membership in this fund. If, in any year, owing to an excessive mortality in the uniformed force, the condition of said life insurance fund shall render it, in the judgment of the said trustee, necessary, a sum not exceeding five thousand dollars may be transferred and paid over from the said relief fund to the said life insurance fund for the use and purpose of said life insurance fund. (*As amended by L. 1908, ch. 355.*)

The widow of an employee of the department whose position had been abolished just prior to his death, is entitled to the benefits of this section, because under § 1543, *post*, an employee whose position is abolished does not cease to be a member of the department, but is deemed to be suspended

without pay and entitled to reinstatement to a similar position within one year from the abolition of his position. *Reidy v. City of New York*, 185 N. Y. 141, rev'g 103 App. Div. 361, 93 N. Y. Supp. 16.

Tax on receipts of foreign fire insurance companies doing business in the borough of Richmond. (See 3d Ed., p. 524.)

§ 810. There shall be paid to the fire commissioner until the seventeenth day of January in the year nineteen hundred and seventeen a percentage or tax upon the receipts of foreign fire insurance companies doing business in the borough of Richmond, and said commissioner shall cause the money so paid to him to be paid out and disposed of as follows:

1. To the New York fire department relief fund, forty-five per centum.

2. To the treasurer of the firemen's association of the state of New York, who shall pay over the same to the treasurer of the volunteer firemen's home association at Hudson, New York, ten per centum.

3. To the treasurer of the veteran firemen's association of the North Shore fire department of Staten Island, veteran and exempt volunteer firemen's association of the Edgewater fire department of Staten Island, New York, veteran volunteer firemen's association of Tottenville fire department and the South Shore veteran and exempt volunteer firemen's association, being exempt or veteran volunteer firemen's associations existing in the borough of Richmond prior to the first day of April nineteen hundred and six, forty-five per centum.

Said forty-five per centum shall be apportioned by said fire commissioner among all such associations in proportion to the actual bona fide membership of each such association on the first day of January next preceding the time when such apportionment is made. In determining the membership of such associations only exempt or honorably discharged volunteer firemen shall be considered as members. The fire commissioner shall quarterly in each year render to each of the foregoing associations a sworn statement in detail of the amounts collected and received by him as aforesaid and from whom and from what source on account of said tax during each quarter. (*As amended by L. 1907, ch. 642.*)

Commissioner of docks; deputy commissioners; appointment and salaries. (See 3d Ed., p. 527.)

§ 816. The head of the department of docks and ferries shall be called the commissioner of docks. He shall be a resident of The

City of New York, and shall be appointed by the mayor. The said commissioner shall have the power to appoint and at pleasure remove two deputies, to be known as first deputy and second deputy. The salary of the said commissioner and said deputies shall be fixed by the board of estimate and apportionment of The City of New York. Pending action by the said board, the salary of said first deputy shall be four thousand five hundred dollars a year, payable monthly. In the absence or inability to act of the commissioner, said first deputy shall possess all the powers and perform all the duties of the commissioner. In the absence or inability to act of the commissioner and the first deputy, the said second deputy shall possess all the powers and perform all the duties of the commissioner. The commissioner shall define the duties of the deputy commissioners and may delegate to either of them any of his powers. (*As amended by L. 1911, ch. 301.*)

§ 818. Jurisdiction of commissioner of docks; powers and duties. (See 3d Ed., p. 528.)

Where the city acquired for park purposes a pier which had been open to public use and permitted it to remain in a dilapidated condition, it is not liable in damages for the death of a person who disembarked thereon and fell through a hole therein, before the pier had been improved and dedicated to the use for which it was acquired. *Birch v. City of New York*, 190 N. Y. 397, rev'g 121 App. Div. 395, 106 N. Y. Supp. 104.

Liability of an owner of a wharf for damages recovered against charterers of a ship by owners of a cargo for loss of same through collapse of a section of the wharf, due to its unsafe condition caused by the piles thereof being eaten away by worms—determined. *Vogeman v. American Dock & Trust Co.*, 131 App. Div. 216, 115 N. Y. Supp. 741, aff'd 198 N. Y. 586.

Fixing, determining upon and establishing the line of high water. (New.)

§ 818a. The commissioner of docks is hereby authorized to fix, determine upon and establish by agreement with the upland owner the line of high water in front of the property of such upland owner upon a straight line or straight lines.

Such agreement together with a map showing the line so fixed, determined upon and established shall be transmitted to the commissioners of the sinking fund for their approval, and upon such approval being given, evidenced by a certificate made upon such map, such line shall become finally fixed, determined upon and established. (*Added by L. 1911, ch. 694.*)

§ 821. Construction of piers and docks. (See 3d Ed.,

An excavation of a street by the city for the purpose of constructing docks which cut off access to the property of an abutting owner for and caused part of his land to fall into the excavation for lack of support, *held*, an invasion of his property rights for which he was entitled to compensation since the excavation was not for a street use but for an enterprise from which the city derives benefit in the collection of taxes and crantage. *Ogden v. City of New York*, 141 App. Div. 578, 126 N. Y. Supp. 189.

§ 822. Purchase of wharf property for corporation; power of city to acquire. (See 3d Ed., p. 535.)

Principles to be applied in determining damage.

The provision of this section limits the award of damages to property actually damaged and does not authorize an award for consequential damage to property embraced within the area of the improvement. *Matter of City of New York (15 & 18th Sts.)*, 56 Misc. 306, 107 N. Y. Supp. 507.

The commissioners cannot deduct from an award for land constituting a plot the amount which they deem the remainder of the plot benefited by the improvement. The provision of this section authorizing such deduction is unconstitutional and void. *Matter of City of New York (North River Water Front)*, 190 N. Y. 350, modified 120 App. Div. 849, 105 N. Y. Supp. 750.

A property owner is not entitled as matter of law to an enhanced award by reason of the single ownership of several parcels of land. Whether an award should be made for plottage depends upon the circumstances of the case, and is a proper subject for determination by the commissioners on the evidence. *Matter of City of New York (15th & 18th Sts.)*, 56 Misc. 306, 107 N. Y. Supp. 507.

A gas company is not entitled to an award for the lessened value of its equipment in the streets, i. e., its gas mains occasioned by the construction of a gas holder under this section. *Matter of City of New York (15th & 18th Sts.)*, 56 Misc. 306, 107 N. Y. Supp. 567.

Where a gas holder which has been in existence for many years under this section, an award therefor cannot be contested upon the ground that the company had no franchise to lay mains connecting with the holder. *Matter of City of New York (North River Water Front)*, 120 App. Div. 849, 105 N. Y. Supp. 750, modified 189 N. Y. 350.

A gas company whose lands have been taken under this section and which has received compensation for a gas holder thereon valued as a "gas concern" is not entitled to receive in addition compensation for the expense of constructing a new main from another of its sources of gas supply. *Matter of City of New York*, 120 App. Div. 849, 105 N. Y. Supp. 750, affirmed 189 N. Y. 350.

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What are trade fixtures for which a tenant is entitled to compensation?
Matter of City of New York (North River Water Front), 192 N. Y. 295;
In re Water Front North River, 118 App. Div. 865, 103 N. Y. Supp. 908,
aff'd 189 N. Y. 508.

Where after the institution of proceedings by the city to take land for a
public improvement, the lessor and lessee of the property enter into an agree-
ment by which the lessee agreed to surrender and release to the lessor its
lease and all claims which it as tenant had against the city for the condemna-

Construction of piers and docks regulated.

§ 821. In executing the plan or plans mentioned in section eight hundred and nineteen of this act, the commissioner of docks shall proceed, according to said plan or plans, to lay out, establish, and construct wharves, piers, bulkheads, basins, docks, or slips in the territory or district embraced in such plan or plans, and in and upon or about the property owned by the city of New York, without interfering with the property or rights of any other person except so far as may be necessary to insure the safety and stability of the wharves, piers, bulkheads, basins or slips so to be constructed. And the said commissioner may commence and carry on such construction in sections of said territory or district from time to time so as not to seriously incommode the commerce of said city. The work of said construction under such plan or plans shall, unless ordered to be otherwise performed by the commissioner of docks, be performed as follows. The said commissioner of docks shall prepare full and minute specifications for such work, and advertise for proposals for doing said work under said plan or plans, and according to such specifications; proposals therefor shall be signed by the bidders for the said work and be sent to the said commissioner within the time specified in such advertisement, accompanied by a bond in the form set forth in said specifications, duly executed. The said commissioner of docks shall open said proposals on a day to be specified in such advertisement and shall examine them and, unless the said commissioner shall deem it for the interest of the city to reject all bids, shall award the contract for such work to the lowest responsible bidder complying with such plan or plans and specifications; such contract shall be executed by the said commissioner of docks on behalf of the city of New York, and shall always contain provisions as to the time of commencing and completing said work and for the retention of ten per centum of its contract price, until the completion of said work, as security for its performance, and for the forfeiture of said contract for non-performance of the terms thereof. Said commissioner of docks may, upon the forfeiture of any such contract, proceed to complete the work thereunder without contract

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holder. Matter of City of New York (North River Water Front), 120 App. Div. 849, 105 N. Y. Supp. 750, mod'd 189 N. Y. 350.

A gas company whose lands have been taken under this section and which has received compensation for a gas holder thereon valued as a "going concern" is not entitled to receive in addition compensation for the expense of constructing a new main from another of its sources of gas supply. Matter of City of New York, 120 App. Div. 849, 105 N. Y. Supp. 750, aff'd 189 N. Y. 350.

Where land under water forming part of a tract used by an electric railroad company as a site for a power house is taken by the city, the changes necessary to be made to give the railroad company absolute control of its power plant with rights of access and of an opportunity to perform all of its functions and operations upon its own premises, should be taken into account in determining the amount of compensation to be awarded. *Matter of City of New York*, 143 App. Div. 515, 128 N. Y. Supp. 12.

Where land under water forming part of a tract used by an electric railroad company as a site for a power house is taken by the city, *held*, that the railroad company was entitled to recover compensation for the loss of access to its plant by water. *Matter of City of New York*, 143 App. Div. 515, 128 N. Y. Supp. 12.

See cases cited under § 980, *post*.

Landlord and tenant.

Where commissioners in condemnation proceedings have awarded a certain sum for additions made to the premises by tenants which, in their opinion, constituted "fixtures which the latter could remove," the basis of valuation on a settlement between the landlord and tenants of their respective rights in the fund thus produced should be the same as that under which the sum to be divided was originally produced, and where the commissioners had adopted a measure of present market value, it is erroneous to substitute in place thereof a "value, if any, . . . based upon the value of the particular property, after it had been detached from the building at the expiration of the demised term . . . with the value of the use of said property for the unexpired term." *Matter of City of New York (North River Water Front)*, 192 N. Y. 295, mod'g 122 App. 890, 106 N. Y. Supp. 119.

The value of lands leased and used for business purposes is to be measured by the net income which the owner derives from them, and an award of \$800,000, for lands and bulkhead rights acquired by a municipality which are leased by the owner and produce a net income of \$43,000 a year, is inadequate. *Matter of City of New York (15th and 18th Sts.)* 56 Misc. 306, 107 N. Y. Supp. 507.

A tenant is entitled to compensation for a right of renewal of a lease upon property taken by the city under this section. *In re Water Front North River*, 118 App. Div. 865, 103 N. Y. Supp. 908, *aff'd* 189 N. Y. 508.

What are trade fixtures for which a tenant is entitled to compensation? *Matter of City of New York (North River Water Front)*, 192 N. Y. 295; *In re Water Front North River*, 118 App. Div. 865, 103 N. Y. Supp. 908, *aff'd* 189 N. Y. 508.

Where after the institution of proceedings by the city to take land for a public improvement, the lessor and lessee of the property enter into an agreement by which the lessee agreed to surrender and release to the lessor its lease and all claims which it as tenant had against the city for the condemna-

tion of the property, but at the same time and in the same agreement reserved any claim it had, for injury to or destruction of its structures or fixtures resulting from the diminished value thereof caused by the severance of the property condemned by the city, *held*, that the agreement was simply one for the apportionment of the damage and that the lessee was entitled to an award for the consequential injuries sustained to its structures and fixtures. *Matter of City of New York (North River Water Front)*, 193 N. Y. 117, rev'g 125 App. Div. 393, 109 N. Y. Supp. 921.

Wharfage rights.

Where a grant of lands under water conveyed to the grantee wharfage and crannage rights, *held* that the grantee was not entitled to compensation because of a public improvement where such rights would be preserved on the outer margin of a new street to be constructed. *Matter of Commissioner of Public Works*, 135 App. Div. 561, 120 N. Y. Supp. 930.

Where the city granted to the owner of property along the Hudson River, the lands lying between high and low water mark, but reserved so much of the same as would be necessary to make a street forty feet wide, *held* that the fee of the forty-five foot strip remained in the city although the street had never been constructed. *Matter of Commissioner of Public Works*, 135 App. Div. 561, 120 N. Y. Supp. 930.

Where the city granted to the owner of abutting uplands on the Hudson River a strip of land, lying between high and low water mark and the city thereafter acquired additional lands extending into the river, beyond the limits of the grant, *held*, that the city could improve the water front thus acquired for commercial purposes, without making compensation for wharfage rights cut off by the improvement. *Matter of Commissioner of Public Works*, 135 App. Div. 561, 120 N. Y. Supp. 930.

Where the grantee of lands lying between high water mark and the established bulkhead line of the Harlem River, constructed piers on said lands from the high water mark to the bulkhead line under the authority of ch. 150 of the Laws of 1868 and by virtue of a municipal permit, he acquired riparian property rights which cannot be taken away without due compensation. *Matter of Commissioner of Public Works*, 135 App. Div. 561, 120 N. Y. Supp. 930.

Bulkhead rights.

The commissioners need not state what additional value they give to land by reason of bulkhead rights adjacent thereto belonging to the same owner, where they report that they took such rights into consideration and that they increased the value of the land taken. *City of New York (15th and 18th Streets)*, 56 Misc. 602, 102 N. Y. Supp. 837.

Shedded piers.

See cases cited under § 844, *post*.

Separate or partial reports in proceedings to acquire wharf property by corporation. (New.)

§ 822a. The commissioners of estimate and appraisal, appointed and qualified in any legal proceeding heretofore or hereafter taken by the corporation counsel of the city of New York to acquire for the said city any property or rights pursuant to section eight hundred and twenty-two of this act, may, upon the completion or closing of the testimony by the claimant or claimants in relation to any one or more of several parcels of land, premises or property embraced in such proceeding, upon consent of the corporation counsel of the city of New York, receive the testimony to be submitted on behalf of said city relating to such parcel or parcels, and may thereupon immediately ascertain and estimate the compensation which ought, justly, to be made, according to law, by the city of New York, to the respective owners, lessees, parties and persons respectively entitled to or interested in one or more of said several parcels of land, premises or property, and make and file a separate abstract of estimate and report as to any or all of such several parcels and submit such separate abstract of estimate and a report to the supreme court. Each of such separate abstracts of estimate and such reports shall be made in the manner specified for the making and filing of the abstract of estimate and the report provided for in title four of chapter seventeen of this act and shall have the same force and effect when confirmed as abstracts of estimate and reports made and filed pursuant to the provisions of said title. All the provisions of said title, in relation to the completion, filing and presentation of a report to the supreme court for confirmation; and in relation to its effect when confirmed; and in relation to any appeal therefrom or review thereof, and in relation to the payment of the compensation therein allowed by said commissioners, shall apply to any such separate or partial report made by said commissioners pursuant to the provisions of this section. (*Added by L. 1910, ch. 245.*)

Acquirement of certain wharf property on the East river. (New.)

§ 823e. In all proceedings hereafter taken by the commissioner of docks of the city of New York, for the acquirement of wharf property, rights, terms, easements or privileges, or lands under water, or uplands in the city of New York, if said wharf property or other lands under water, or wharf property to which said rights, terms, easements or privileges are appurtenant is, or are situated between the northerly or easterly side of Montgomery street and the southerly side of East Eighth street or between the northerly

side of East Thirteenth street and the southerly side of East Fourteenth street, upon or adjacent to the East river, in the borough of Manhattan, city of New York, it shall not be necessary for the said commissioner of docks to make any attempt to agree with the owner of any such property, rights, terms, easements, privileges, uplands or lands under water, upon a price for the same before commencing the proceedings authorized by section eight hundred and twenty-two of this act. In a proceeding hereafter brought for the acquirement of any such wharf property, rights, terms, easements or privileges, or uplands, or lands under water situate as in this section set forth, if the commissioners of the sinking fund shall by resolution so direct, the title of said wharf property, uplands and lands under water, rights, terms, easements and privileges, shall vest in the city of New York, at such time as said resolution shall direct after the filing in the office of the clerk of the supreme court in the first judicial district of the oaths of the commissioners of estimate and assessment in said proceedings appointed, and all of the rights, title and interest of any and all of the owners or persons interested in the said wharf property, rights, terms, easements and privileges, or lands under water, or uplands, shall cease and determine and be extinguished at such time. All the awards made in said proceeding for the value of property acquired, or interests extinguished shall draw interest at the legal rate from the time of vesting of title in the city of New York to the date of payment thereof. No resolution of the commissioners of the sinking fund or of the board of estimate and apportionment, approving or authorizing the acquisition of land, or directing the vesting in the city of New York of any title to property, and no resolution of the commissioners of the sinking fund adopting or approving, or consenting to, or certifying to a plan or plans, or to any change therein, for the whole or any part of the water front within the limits of the city of New York, shall be of any validity or effect unless passed at a public hearing of said commissioners or board, of which public notice shall be given by publication for six consecutive days in the City Record, not less than seven, nor more than thirty days before said public hearing, which publication shall contain, in addition to such information as the commissioner of docks may think proper, a description of the property to be affected by the resolution, a statement by the chairman of the commission or board, of the date, time and place of said public hearing, an abstract of the recommendation of the head of the department, in regard to the said vesting of title, or adoption or approval or consent or certificate to said plan or plans or change therein, which said plan or plans and recommendation or change therein as

proposed, shall be open to the inspection of any citizen at the office of the comptroller of the city of New York at all times during business hours, from the beginning of publication until the day of said hearing. (*Added by L. 1907, ch. 372.*)

Acquirement of certain wharf property on the North river.
(New.)

§ 823f. In all proceedings hereafter taken by the commissioner of docks of the city of New York, for the acquirement of wharf property, rights, terms, easements or privileges, or lands under water or uplands in the city of New York, if said wharf property or other lands under water, or wharf property to which said rights, terms, easements or privileges are appurtenant is or are situated between the northerly side of West Thirty-fourth street and the southerly side of West Forty-second street or between the northerly side of West Forty-ninth street and the southerly side of West Fiftieth street, upon or adjacent to the North river, in the borough of Manhattan, city of New York, it shall not be necessary for the said commissioner of docks to make any attempt to agree with the owner of any such property, rights, terms, easements, privileges, uplands, or lands under water, upon a price for the same before commencing the proceedings authorized by section eight hundred and twenty-two of this act. In a proceeding hereafter brought for the acquirement of any such wharf property, rights, terms, easements or privileges, or uplands, or lands under water situate as in this section set forth, if the commissioners of the sinking fund shall by resolution so direct, the title of said wharf property, uplands and lands under water, rights, terms, easements and privileges shall vest in the city of New York at such time as said resolution shall direct after the filing in the office of the clerk of the supreme court in the first judicial district of the oaths of the commissioners of estimate and assessment in said proceedings appointed, and all of the rights, title and interest of any and all of the owners or persons interested in the said wharf property, rights, terms, easements and privileges or lands under water or uplands, shall cease and determine and be extinguished at such time. All the awards made in said proceeding for the value of property acquired or interests extinguished shall draw interest at the legal rate from the time of vesting of title in the city of New York to the date of payment thereof. (*Added by L. 1907, ch. 435.*)

Acquirement of certain wharf property in Brooklyn. (New.)

§ 823g. In all proceedings hereafter taken by the commissioner of docks and ferries of the city of New York, for the acquirement

of wharf property, rights, terms, easements or privileges, or lands under water and uplands in the city of New York, if said wharf property or lands under water or uplands, or wharf property to which said rights, terms, easements or privileges are appurtenant, is or are situated in the borough of Brooklyn, at the junction of Whale and Newtown creeks, and between said creeks and North Henry and Green streets, it shall not be necessary for the said commissioner of docks to make any attempt to agree with the owners of any such property, rights, terms, easements, privileges, uplands or lands under water, upon a price for the same before commencing the proceedings authorized by section eight hundred and twenty-two of this act. In a proceeding hereafter brought for the acquirement of any such wharf property, rights, terms, easements, or privileges, uplands or lands under water, situate as in this section set forth, if the commissioners of the sinking fund shall by resolution so direct, the title to the said wharf property, uplands and lands under water, rights, terms, easements and privileges shall vest in the city of New York at such times as said resolution shall direct, after the filing in the office of the clerk of the county where such proceedings are pending, of the oaths of the commissioners of estimate and assessment in said proceeding appointed, and all of the rights, title and interest of any and all of the owners or persons interested in the said wharf property, rights, terms, easements and privileges, or lands under water or uplands, shall cease and determine and be extinguished at such time. (*Added by L. 1908, ch. 381.*)

Acquirement of certain wharf property on the North river.
(New.)

§ 823h. In all proceedings hereafter taken by the commissioner of docks of the city of New York, for the acquirement of wharf property, rights, terms, easements or privileges, or lands under water or uplands in the city of New York, if said wharf property or other lands under water, or wharf property to which said rights, terms, easements or privileges are appurtenant is or are situated between the northerly side of West Forty-fourth street and the southerly side of West Forty-ninth street, upon or adjacent to the North river, in the borough of Manhattan, city of New York, it shall not be necessary for the said commissioner of docks to make any attempt to agree with the owner or owners of any such property, rights, terms, easements, privileges, uplands or lands under water, upon a price for the same before commencing the proceedings authorized by section eight hundred and twenty-two of this act. In a proceeding hereafter brought for the acquirement of any such

wharf property, rights, terms, easements or privileges, or uplands, or lands under water situate as in this section set forth, if the commissioners of the sinking fund shall by resolution so direct, the title to said wharf property, uplands and lands under water, rights, terms, easements and privileges shall vest in the city of New York at such time as said resolution shall direct after the filing in the office of the clerk of the supreme court in the first judicial district of the oaths of the commissioners of estimate and assessment in said proceedings appointed, and all of the right, title and interest of any and all the owners or persons interested in the said wharf property, rights, terms, easements and privileges or lands under water or uplands, shall cease and determine and be extinguished at such time. All the awards made in said proceeding for the value of property acquired or interests extinguished shall draw interest at the legal rate from the time of vesting of title in the city of New York to the date of payment thereof. (*Added by L. 1911, ch. 661.*)

Commissioner of docks; power to acquire and operate ferries.
(New.)

§ 824a. The commissioner of docks, with the approval of the commissioners of the sinking fund, is authorized in his discretion to acquire by purchase or condemnation, in the name and for the benefit of the corporation of the city of New York, any property now or formerly used in connection with any ferry or ferries (except such ferry or ferries as may be the property of a railroad corporation), situated in the borough of Brooklyn in said city, between the northerly line of South Sixth street extended westerly and the southerly line of South Ninth street extended westerly, and such additional property as may be required for terminal facilities or approaches, and to equip, maintain and operate any such ferry or ferries. The comptroller shall from time to time when authorized by the board of estimate and apportionment on the recommendation of the commissioners of the sinking fund, issue corporate stock of the city of New York, in such amounts as they may deem the public interests to demand for the purpose of raising the money necessary to carry out the provisions of this section; except that no corporate stock shall be issued to maintain and operate such ferries to be acquired by this act. Whatever moneys may be required to provide for any deficiency caused by the operation or maintenance of ferries to be acquired by this act shall be provided in the manner now prescribed by law for raising moneys to maintain and operate city properties. If the said commissioner of docks shall deem it proper and expedient that the said corporation should acquire right and title to and pos-

session of any property, now or formerly used in connection with any ferry or ferries, and situated in the borough of Brooklyn between the northerly line of South Sixth street extended westerly, and the southerly line of South Ninth street extended westerly, and such additional property as may be required for terminal facilities or approaches, by condemnation instead of by purchase, the said commissioner of docks may, with the approval of the commissioners of the sinking fund, direct the corporation counsel of said city to take legal proceedings to acquire the same for the city, and the said corporation counsel shall take the same proceedings to acquire the same as are by law provided for the taking of private property in said city for public streets or places, and the provisions of law relating to the taking of private property for public streets or places in said city are hereby made applicable, as far as may be necessary to the acquiring of said ferry or ferries, together with all the property belonging thereto, and such additional property as may be required for terminal facilities or approaches. In a proceeding hereafter brought for the acquirement of any property used in connection with any such ferry or ferries, and such additional property as may be required for terminal facilities or approaches, if the commissioners of the sinking fund by resolution shall so direct, title to the said ferry or ferries and such additional property as may be required for terminal facilities or approaches shall vest in the city of New York at such time as said resolution of the commissioners of the sinking fund shall direct after the filing in the office of the clerk of the county where the proceedings are pending of the oaths of the commissioners of estimate in said proceedings appointed, and all of the rights, title and interest of any and all of the owners or persons interested in such property used in connection with said ferry or ferries, and such additional property as may be required for terminal facilities or approaches, shall cease and determine and be extinguished at such time. All the awards made in such proceedings for the value of property acquired or interest extinguished, shall draw interest at the legal rate from the time of the vesting of title in the city of New York.

Each and every captain, pilot, quartermaster, engineer, assistant engineer, ticket agent, ticket chopper, fireman, deck hand, oiler, gate-man, bridgeman, and matron, who, on the first day of January, nineteen hundred and eight, was employed as such on any ferry, the operation of which shall, hereafter, be assumed by the city of New York, and who shall prior thereto have successfully passed a non-competitive civil service examination under the civil service law in accordance with rules and regulations prepared by the municipal

civil service commission, may be retained and assigned to perform service on any ferry, the operation of which shall be assumed by the city of New York, or which has heretofore been assumed by the city of New York. Except that in the case of captains, pilots, quartermasters, engineers, and assistant engineers who have served in such capacity on said ferries for a period of not less than ten years, the production of a license or certificate of fitness granted by the United States government shall be deemed equivalent to a civil service examination. (*As amended by L. 1909, ch. 331.*)

This section as amended by L. 1909, ch. 331, giving discretionary powers to the dock commissioners, with approval of commissioners of sinking fund, to acquire by purchase or condemnation of certain land for ferry purposes, does not contravene N. Y. State Constitution, art. I, §§ 6 and 7, on the theory that the land vested in the city perforce of the amending act, on the day it took effect. By the statute, the commissioner was merely authorized to acquire the land, in his discretion, by purchase or condemnation proceedings, a change in the method of procedure. *Matter of City of New York (Brooklyn Ferry)*, 140 App. Div. 238, 125 N. Y. Supp. 210, *aff'd* 68 Misc. 509, 125 N. Y. Supp. 209.

The city cannot be compelled, at the instance of a taxpayer, by mandatory injunction, to operate a ferry established under the powers granted to the city by the Montgomerie Charter of 1730; the remedy is by mandamus. Nor can the purchasers at a foreclosure sale of the land, boats and equipment of an insolvent lessee of certain ferries, be compelled by injunction to operate such ferries against their will, it not being shown that they were under any duty to the public so to do. *Wurster v. City of New York*, 115 N. Y. Supp. 192, *aff'd* 136 App. Div. 409, 120 N. Y. Supp. 1029, *aff'd* 199 N. Y. 534.

See cases cited under § 826, *post*.

§ 825. Wharfage and dockage charges; leasing property. (See 3d Ed., p. 541.)

Cancellation of leases.

Where a lease of lands under water contains a provision authorizing the city to cancel the lease should the property be required for the improvement of the water front, *held* that the city was not justified in canceling the lease upon the filing of a tentative plan for the improvement of the water front which the city has made no attempt to carry out. *Donohue v. City of New York*, 54 Misc. 415, 105 N. Y. Supp. 1069.

§ 826. Ferries; establishment and leasing of. (See 3d Ed., p. 544.)

The right of the city to establish ferries around Manhattan Island, granted to it by the Montgomerie Charter in 1730, was a property right in the nature

of a perpetual franchise and not a power granted to the city as a function of government; the city by accepting the grant assumed the obligation to operate for the public the ferries established thereunder, and this duty may be enforced by mandamus at the suit of a private citizen to compel the city to offer a lease of a ferry at public auction pursuant to the provisions of this section, unless such ferry is leased by private agreement or proceedings are taken to acquire the necessary land for the purpose of municipal operation as authorized by this section or the property necessary for municipal operation is acquired by purchase as authorized by § 824a *supra*. *Matter of Wheeler*, 62 Misc. 37, 115 N. Y. Supp. 605.

Where the terms of sale of the lease of a ferry franchise provided that the successful bidder should make a deposit of 25 per cent of the bid and in the event of his default that he should forfeit such deposit, *held*, that the bidder could not recover such deposit where he refuses to carry out the purchase upon tender of the lease by the city. *Philips v. City of New York*, 124 App. Div. 307, 108 N. Y. Supp. 1059.

Recreation piers; power of commissioner of docks. (See 3d Ed., p. 550.)

§ 837. The commissioner of docks is hereby authorized to set apart piers in the city of New York as the said commissioner of docks shall deem, from time to time, necessary for the use of the inhabitants of the city of New York, as hereinafter provided, and for the convenience of dealers in country produce and other merchandise transported to the city of New York for sale. The purpose of this section is to afford the inhabitants of the city of New York greater opportunity for healthful recreation than they now possess, and to accomplish such end the said commissioner of docks is hereby authorized to construct or rebuild the piers set apart under the provisions of this section for public use in such manner as shall provide a platform or upper story thereof, and the approaches thereto, which shall be constructed under the direction of a skilled architect, who shall be employed by said commissioner of docks for that purpose. The intention hereof being to permit the upper story of each one of the piers so set apart for public use to be wholly free to the inhabitants of said city for the purpose aforesaid without interference with business occupations, and the said piers on the lower stories thereof shall be open to use to boats and vessels plying upon canals, rivers and lakes of this state which may bring merchandise to the city for sale therein. The occupation of positions by boats at the piers herein mentioned shall be under the control of the commissioner of docks, and order shall be maintained by the police authorities of the city of New York in and around such portions of the said docks as may be set apart for recreation

purposes aforesaid. Except as hereinbefore provided, no wharf, pier, bulkhead or shed shall be required by the commissioner of docks to be so constructed as to admit of the free public use of the roof thereof for the purposes of resort and recreation. (*As amended by L. 1908, ch. 380.*)

§ 844. Sheds for protection of property upon piers or bulkheads; construction of the same regulated by commissioner of docks. (See 3d Ed., p. 552.)

License to shed pier.

It seems that the owner or tenant of a pier is not entitled as matter of right to a license to erect a shed thereon but that the granting or withholding of such license rests in the sound discretion of the commissioners. *Matter of City of New York (Old Pier, 11 East River)*, 124 App. Div. 465, 109 N. Y. Supp. 2, aff'd 192 N. Y. 539.

Under the provisions of this section providing that a license which has been granted to erect a shed and acted upon, shall not be revoked by the commissioner of docks without the consent in writing of the mayor and of the commissioners of the sinking fund, *held* that a mere notice of the commissioner of docks revoking the license is ineffective, and when the city acquires the wharfage rights by condemnation, the owner is entitled to compensation for the sheds taken. *Matter of City of New York (Piers Old Nos. 16 and 17)*, 138 App. Div. 186, 122 N. Y. Supp. 1034, aff'd 199 N. Y. 570.

The destruction of a shed by fire does not operate as a termination of a license to shed a pier which is in the nature of an incorporeal hereditament. *Matter of City of New York (Piers Old Nos. 19 and 20)*, 117 App. Div. 553, 102 N. Y. Supp. 667.

The license to erect a shed conferred upon the owner of a pier pursuant to this section, is property for which such owner is entitled to compensation in condemnation proceedings instituted by the city to acquire such pier. *Matter of City of New York (Piers Old Nos. 19 and 20)*, 117 App. Div. 553, 102 N. Y. Supp. 667.

Where a pier having no present shedding right appurtenant thereto is taken by the city, its owner is not entitled to compensation for the possibility that a license to shed the pier might be granted in the future. *Matter of City of New York*, 117 App. Div. 553, 102 N. Y. Supp. 667; *Matter of City of New York (Pier Old No. 11)*, 124 App. Div. 465, 109 N. Y. Supp. 2, aff'd 192 N. Y. 539.

It seems that the commissioner of docks has the authority to impose as a condition of granting a license to shed a pier that the licensee will not claim compensation for the additional value which the shed privilege gives to the pier should the same be taken by the city in condemnation proceedings.

Matter of the City of New York (Pier Old No. 11, East River), 124 App. Div. 465, 109 N. Y. Supp. 2, aff'd 192 N. Y. 539.

An owner of a pier who accepts a license to erect a shed thereon containing a condition that should the pier be taken by the city he will not claim any additional value because of such license, is estopped from asserting a claim for compensation for the shed privilege in proceedings instituted to condemn such pier. **Matter of City of New York (Pier Old No. 11, East River), 124 App. Div. 465, 109 N. Y. Supp. 2, aff'd 192 N. Y. 539; Matter of City of New York (*In re* Old Pier Nos. 19 and 20), 50 Misc. 477, 100 N. Y. Supp. 626.**

Where the city had begun proceedings by condemnation to acquire the rights of an owner of a pier, the latter cannot, pending such proceedings, maintain an action in equity against the city on the ground of a continuing trespass of the owner's rights, nor equitable grounds for injunctive relief lacking, can the court proceed to award damages claimed in the equity action, such damages being only recoverable in the pending condemnation proceedings. **American Ice Co. v. City of New York, 51 Misc. 114, 100 N. Y. Supp. 748.**

§ 848. Dock masters; certain powers of. (See 3d Ed., p. 554.)

A dock master unless duly authorized by the department of docks and ferries has no power to bind the city to pay for work done by his direction. **Sheridan v. City of New York, 145 Fed. 835.**

Grants of land under water restricted. (See 3d Ed., p. 570.)

§ 876. No grants of land under water shall be made by the board of aldermen of The City of New York, or by any officer, board, or department thereof, beyond the exterior lines of the city of New York, as fixed by an act of the legislature, passed April seventeenth, eighteen hundred and fifty-seven, entitled "An act to establish bulkhead and pier lines for the port of New York," as amended by subsequent act, unless as expressly authorized by acts passed subsequent thereto. But the city of New York is authorized in its discretion to convey to the state of New York in fee simple absolute such dock lands and adjacent lands under water as may by resolution of the canal board be declared necessary for canal terminals, such lands to be and remain public lands under the sole control of the state. (*As amended by L. 1910, ch. 269.*)

§ 879. Injuries to vessels lying at exterior end of wharf.
(See 3d Ed., p. 571.)

The scope of this section is stated by Holt, J., in **Wright & Cobb Lighterage Co. v. New England N. Co., 189 Fed. 809**, as follows: "It has always been

the custom in New York Harbor for vessels to moor for temporary purposes at the ends of piers as well as at the sides; and, while any vessel so moored is obviously in a somewhat more dangerous position than if moored in a slip, it never has been held, so far as I am aware, to be illegal or a fault in navigation for a vessel to moor at the end of a slip. This statute obviously does not make it illegal. It simply provides that, if a vessel does lie at the exterior end of a wharf in the North or East River, it shall be at its own risk of injury from vessels entering or leaving any adjacent dock or pier. This statute does not make a vessel moored at the exterior end of a pier take the risk of injury from collision with a vessel which is not entering an adjacent dock or pier. This has been expressly held in various cases."

Deputy tax commissioners; duties of in assessing taxable property. (See 3d Ed., p. 576.)

§ 889. It shall be the duty of the deputy tax commissioners, under the direction of the board of taxes and assessments, to assess all the taxable property in the several districts that may be assigned to them for that purpose by said board, and they shall furnish to the said board, under oath, a detailed statement of all such property, showing that said deputies have personally examined each and every house, building, lot, pier, or other assessable property, giving the street, lot, ward, town and map number of such real estate embraced within said districts, together with the name of the owner or occupant, if known; also the sum for which, in their judgment, each separately assessed parcel of real estate under ordinary circumstances would sell if it were wholly unimproved; and separately stated, the sum for which under ordinary circumstances, the same parcel of real estate would sell with the improvements, if any, thereon; with such other information in detail relative to personal property or otherwise, as the said board may, from time to time, require. Such deputies shall commence to assess real and personal estate on the first day in April in each and every year not a Sunday or a legal holiday. (*As amended by L. 1911, ch. 455.*)

Assessment of real property.

Under the provisions of this section making it the duty of the tax commissioners to assess real property at its market value, i. e., the amount for which it would sell in ordinary circumstances *held*, that land dedicated and held in trust for park purposes could not be assessed for taxation since the same could not be sold under ordinary circumstances for any sum whatever. *People ex rel. Poor v. Wells*, 139 App. Div. 83, 124 N. Y. Supp. 36, *aff'd* 200 N. Y. 518.

In the tax assessment of real property under Tax Law (L. 1909, ch. 62), no deduction of a mortgage is authorized, the only deduction allowable being made from personal property. There is no constitutional provision

requiring equality in the tax assessment of real and personal property and forbidding a tax on real property without allowing any deduction for debts of the owner. *Paddell v. City of New York*, 50 Misc. 422, 100 N. Y. Supp. 581, aff'd 114 App. Div. 911, 100 N. Y. Supp. 1133, aff'd 187 N. Y. 552.

Assessment of bank stock.

This section does not apply to the taxation of bank stock, but such taxation is governed by the Tax Law (L. 1909, ch. 62). The provision of § 36 of the Tax Law with reference to notice of assessments that "in any city the notice shall conform to the requirements of the law regulating the time, place and manner of revising assessments in such city" cannot be held to apply to the assessment of bank shares in The City of New York, where under the provisions of this section of the charter and § 895, *post*, the time for hearing complaints and revising assessments expires before the assessments on bank shares can, in accordance with the provisions of the Tax Law authorizing it, be imposed, since the scheme of taxing bank shares, not only in respect to the amount, but also to the manner and method of its imposition, stands by itself, independent and separate from that prescribed for the assessment and taxation of other property. The claim that the Tax Law, so far as it relates to taxation of bank shares in New York City, is unconstitutional, in that the last grievance day would have passed before the assessment on that kind of property could be imposed, thereby depriving the owners of an opportunity to be heard—cannot be upheld, but where it appears that the assessors failed to comply with the law, gave no notice and refused to hear any complaint, the assessment will be set aside for irregularity. *People ex rel. Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88, rev'g 120 App. Div. 838, 105 N. Y. Supp. 993.

Assessment of special franchise.

The local assessors are without jurisdiction to assess a special franchise of a railroad company, although it includes tangible property, such jurisdiction being vested in the state board of tax commissioners, and the local assessment may be declared void by appropriate remedy. *People ex rel. H. & M. R. R. Co. v. Tax Commissioners*, 69 Misc. 1, 125 N. Y. Supp. 895.

Annual record of assessed valuation; what to contain and when to be open for examination and correction. (See 3d Ed., p. 578.)

§ 892. There shall be kept in the several offices established by the department of taxes and assessments books to be called "the annual record of the assessed valuation of real and personal estate of the borough of, —," in which shall be entered in detail the assessed valuation of such property within the limits of the several boroughs of the city of New York as established by this act. In such books the assessed value of real estate shall be set down in two columns; in the first column shall be given, opposite each separately assessed parcel of real estate, the sum for which such parcel under

ordinary circumstances, would sell if wholly unimproved; and in the second column shall be set down the sum for which the said parcel under ordinary circumstances, would sell, with the improvements, if any, thereon. The annual record of the assessed valuation of real property shall be open for public inspection, examination and correction from the first day in October not a Sunday or a legal holiday until the sixteenth day of November in each year, and the annual record of the assessed valuation of personal estate shall be open for public inspection, examination and correction from the first day in October not a Sunday or a legal holiday until the first day of December in each year, but on the said respective days the same shall be closed to enable the board of taxes and assessments to prepare assessment-rolls of the several boroughs for delivery to the board of aldermen. The said board, previous to and during the time the said books are open as aforesaid for inspection, shall advertise the fact in the City Record and in such other newspaper or newspapers published in the several boroughs created by this act as may be authorized by the board of city record. The taxable status of all persons and property assessable for taxation in the city of New York shall be fixed for each year on the day of October in the preceding year provided by law for the opening of the books of annual record of the assessed valuation of real and personal estate of that year. (*As amended by L. 1911, ch. 455.*)

Status of property fixed on second Monday of January.

The taxable status of property being fixed on the second Monday of January, and it being conceded that The City of New York owned the property on that day and it was exempt from taxation by the Tax Law (L. 1909, ch. 62, § 4, subd. 3), the fact that the necessity for the use of the property by the city having ceased, and the property not sold to a private person until May of the year, did not subject such property to taxation for the year. *People ex rel. Hollock v. Purdy*, 72 Misc. 122, 130 N. Y. Supp. 1077.

Prior to the enactment of § 894a, *post*, it was well settled that the tax commissioners had no authority to add a name to the assessment roll after the first Monday of January. Under the latter section the tax commissioners now have the power to correct the assessment roll during the period that the same is open for public inspection upon complying with the provision requiring ten days' notice to the party interested. *People ex rel. Stebbins v. Purdy*, 144 App. Div. 361, 129 N. Y. Supp. 273, *rev'g* 69 Misc. 367, 125 N. Y. Supp. 986.

Apportionment of assessments after the first day of October; notice. (New.)

§ 892a. When prior to the first day of February, any separately

assessed parcel of real estate shall have been divided the board of taxes and assessments may apportion the assessment thereof in such manner as they shall deem to be just and equitable and forthwith cause the assessment to be canceled and new assessments, equal in the aggregate to the canceled assessment, to be made on the proper books or rolls, and within five days thereafter shall cause written notice of the new assessments to be mailed to the owners of record of the real estate so assessed at their last known residence or business address and an affidavit of the mailing of such notice to be filed in the main office. When such notice is mailed after the twenty-fifth day of October such owners of real estate may apply for correction of such assessments within twenty days after the mailing of such notice with the same force and effect as if such application were made on or before the fifteenth day of November in any year. (*As amended by L. 1911, ch. 455.*)

Assessed valuation of personal property; how to be entered.

(See 3d Ed., p. 581.)

§ 894. The assessed valuation of all personal property shall be entered by said deputy tax commissioners, or by such other persons as may be assigned to that duty by the department of taxes and assessments in the several offices, in books, or rolls, in alphabetical order, of the names of persons and corporations subject to taxation. No tax or assessment shall be void by reason of the name of the rightful owner or owners, whether individuals or corporations, of real estate in any of the said boroughs not being inscribed in the assessment rolls or lists; but in such case no tax shall be collected except from the real estate so assessed. The assessed valuation of all real and personal property of corporations shall be entered in duplicate in the office in the borough where the same is assessed and in the main office of the department of taxes and assessments in the borough of Manhattan. If, at any time prior to the first day of January in any year, it shall appear to the tax commissioners that a person assessed for taxation on personal estate on the books or rolls of one borough should have been assessed therefor on the books or rolls of another borough, they shall forthwith cause the assessment to be canceled and a new assessment to be made on the proper books or rolls, and within five days thereafter shall cause written notice of the new assessment to be mailed to such person at his last known residence or business address within the city of New York, and an affidavit of the mailing of such notice to be filed in the main office. The person so notified may apply for correction of such assessment on or before the twentieth day of January with the same force and

effect as if such application were made on or before the thirtieth day of November in any year. (*As amended by L. 1911, ch. 455.*)

Real property need not be entered against owner.

Taxes on real estate under this section are not required to be assessed against the owner. The only effect of omitting the owner's name or of assessing in the name of one not the owner is to confine the city's remedy to a lien upon the land. *Underground Electric Ry. Co. v. Owsley*, 190 Fed. Rep. 679. *People ex rel Myers v. Moynahan*, 130 App. Div. 46, 114 N. Y. Supp. 417.

§ 894a. Power of department to add property and names to assessment rolls. (See 3d Ed., p. 583.)

The provisions of this section authorizing the tax commissioners to correct the tax roll, *held*, constitutional and valid. *People ex rel. Stebbins v. Purdy*, 144 App. Div. 361, 129 N. Y. Supp. 273, rev'g 69 Misc. 367, 125 N. Y. Supp. 986.

Under this section, the tax commissioners have the power during the period the books are open for public inspection and correction to assess the assessment roll by adding personal property thereto which has been previously omitted from the roll upon complying with the provision requiring ten days' notice to the party interested. *People ex rel. Stebbins v. Purdy*, 144 App. Div. 361, 129 N. Y. Supp. 273, rev'g 69 Misc. 367, 125 N. Y. Supp. 986.

Under §§ 892 and 894, *ante*, the executor of a testator dying before the second Monday of January, is the owner of the personal estate; and although the name of the testator has been placed on the roll as owner, the latter act being void, the board of taxes and assessments under this section, as long as the books remain open for correction, on ten days' notice to the person in interest, may add to the assessment roll the name of the executor as owner. *People ex rel. Stebbins v. Purdy*, 144 App. Div. 361, 129 N. Y. Supp. 273, rev'g 69 Misc. 367, 125 N. Y. Supp. 986.

Applications for correction of assessment. (See 3d Ed., p. 583.)

§ 895. During the time that books shall be open to public inspection as aforesaid application may be made by any person or corporation claiming to be aggrieved by the assessed valuation of real or personal estate, to have the same corrected. If such application be made in relation to the assessed valuation of real estate, it must be made in writing, stating the ground of objection thereto. The board of taxes and assessments shall examine into the complaint, as herein provided, and if in their judgment the assessment is erroneous they shall cause the same to be corrected. If such application be made in relation to the assessed valuation

of personal estate, the applicant shall be examined under oath by a commissioner of taxes and assessments or by a deputy tax commissioner, as herein provided, who are hereby authorized to administer such oath, and if the assessment as hereinafter provided be determined by the board of taxes and assessments to be erroneous, it shall cause the same to be corrected and fix the amount of such assessment as the board of taxes and assessments may believe to be just, and declare its decision upon and application within the time and in the manner hereinafter provided. But the commissioners of taxes and assessments may, during the last fifteen days of the month of November and during the months of December and January in any year, act upon applications, examine applicants under oath and take other testimony thereon, for the reduction of assessments upon either real or personal property filed in their offices on or before the fifteenth day of November preceding as to real estate, and on or before the thirteenth day of November preceding as to personal estate, and cause the amount of any assessment as corrected by the board of taxes and assessments to be entered upon the assessment rolls for the year for which such correction is made. (*As amended by L. 1911, ch. 455.*)

The provisions of this section relating to personal property do not prohibit the filing of a written application for the correction or cancellation of an assessment, nor do they require that the application shall be made to the commissioners personally by the person seeking relief. The statute does not require the commissioners to compel the attendance of the applicant. Where the written application is, however, returned with notice that the personal appearance of the party assessed is necessary before March 31, the applicant is not relieved from the duty of appearing for a personal examination or attempting to procure a hearing at which evidence might be taken. *People ex rel. Kennedy v. O'Donnell*, 133 App. Div. 237, 117 N. Y. Supp. 488, *aff'd* 197 N. Y. 582.

See *People ex rel. Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88, *rev'g* 120 App. Div. 838, 105 N. Y. Supp. 993, digested under § 889, *ante*.

When assessed valuation may be increased or diminished.

(See 3d Ed., p. 588.)

§ 896. The board of taxes and assessments may increase at any time before the sixteenth day of November as to real estate, and before the first day of December as to personal estate in each year, or may diminish at any time before the first day of December in each year, the assessed valuation of any real or personal estate of any individual or corporation as in its judgment may be just or necessary for the equalization of taxation; but it shall not increase such valua-

tions of the property of any individual or corporation after said books are opened for correction and review, except upon notice given to the individual or corporation affected by such increase at least ten days before the fifteenth day of December in each year. (*As amended by L. 1911, ch. 455.*)

This section providing that the assessed valuation after the books of annual record are opened, shall not be increased except upon notice to the individual or corporation affected thereby, clearly implies that the taxpayer may rely with confidence upon the proposition that his assessment will not be augmented in any respect without his knowledge and an opportunity to object. *People ex rel. Kemp R. E. Co. v. O'Donnel*, 198 N. Y. 48, mod'g 133 App. Div. 894, 118 N. Y. Supp. 1133.


Power of board of taxes and assessments to remit or reduce taxes. (See 3d Ed., p. 589.)

§ 897. The board of taxes and assessments is hereby invested with power to remit or reduce where in the opinion of the corporation counsel lawful cause therefor is shown. It may remit or reduce if found excessive or erroneous, a tax imposed upon real or personal property. It shall require a majority of the commissioners of taxes and assessments to remit or reduce the assessed valuation of personal property, and no tax on personal property shall be remitted, canceled or reduced, except to correct clerical errors, unless the person aggrieved shall satisfy the board of taxes and assessments that illness or absence from the city had prevented the filing of the complaint or making the application to the said board within the time allowed by law for the correction of taxes. Any remission or reduction of taxes upon the real estate of individuals or corporations must be made within one year after the delivery of the books to the receiver of taxes for the collection of such tax. (*As amended by L. 1908, ch. 64.*)

Application for revision and cancellation of assessment in the several boroughs; when and how made. (See 3d Ed., p. 590.)

§ 898. The board of taxes and assessments from the whole number of persons appointed as deputy tax commissioners shall, for each of the boroughs wherein one of the offices of the department of taxes and assessments is established and maintained, designate one or more deputy tax commissioners, who shall, between the first day of October in each year and the sixteenth day of November following as to real estate, and the first day of December following as to

personal estate, receive applications for the revision and cancellation of any assessments entered in the books of annual record of the assessed valuation of real and personal estate in that borough, take testimony on such applications and reduce the same to writing, and when so reduced to writing transmit such applications and testimony, with his recommendation, to the board of taxes and assessments at its main office in the borough of Manhattan, or to any office of the department of taxes and assessments in any borough as the board of taxes and assessments may prescribe. Such deputy tax commissioners as may be designated for the purposes and as prescribed in this section are hereby authorized between the first day of October and the first day of December to administer oaths for the purpose of taking testimony upon all applications for the revision or cancellation of assessments, and they are hereby required and directed to transmit the evidence so taken and reduced to writing within ten days after the evidence upon any application is taken, with their recommendation, as hereinbefore described. The board of taxes and assessments shall hear at its main office all applications of corporations for revision and cancellation of assessments; and as to all other applications, the said board may prescribe the time and place of hearing thereof in the several boroughs and give such



Deputy tax commissioners to make up aggregate amount of assessed valuation in the boroughs. (See 3d Ed., p. 591.)

§ 899. It is hereby declared to be the duty of the deputy tax commissioners, or of such other persons as may have been assigned to the charge and direction of any one of the offices of the department of taxes and assessments in the several boroughs, to compute from the annual record of the assessed valuations of real and personal estate in each of the said several offices, the total aggregate amount of the assessed valuation of real and personal property appearing on said books for each of the said boroughs on the first day in October in any year not a Sunday or a legal holiday, and to transmit a statement of such aggregate amounts of assessed valuations of real and personal property in the said several boroughs to the department of taxes and assessments at its main office in the borough of Manhattan on or before the first day in October in each year not a Sunday or a legal holiday. The board of taxes and assessments is hereby vested with the power and charged with the duty before opening the books for public inspection as herein prescribed, to fix such valuations of property for the purposes of taxation throughout the city of New York at such sums as will, in its judgment, establish a just and equal relation between the valuations of property in each bor-

Comptroller to submit to board of aldermen a statement showing amounts necessary to be raised by taxation.

§ 900. For the purpose of enabling the board of aldermen to impose the annual taxes it shall be the duty of the comptroller of said city to prepare and submit to said board, at least one week before the first day of March in each and every year, a statement setting forth the amounts by law authorized to be raised by tax in that year, on account of the corporation of the city of New York, as hereby constituted, or for city purposes within said city as created by this act, and purposes for which said city is liable, and on account of the counties of New York, Kings, Queens and Richmond, and also an estimate of the probable amount of receipts into the city treasury during the then current year from all the sources of revenue of the general funds, including surplus revenue from the sinking funds of the mayor, aldermen and commonalty of the city of New York and of any of the municipal and public corporations, or parts of municipal and public corporations by this act consolidated with the municipal corporation known as the mayor, aldermen and commonalty of the city of New York, other than the surplus of revenues of any such sinking funds for the payment of interest on the city debt of the municipal corporation known as the mayor, aldermen and commonalty of the city of New York, or the like debts of the municipal and public corporations by this act consolidated as aforesaid, and the said board of aldermen is hereby authorized and directed to deduct the total amount of such estimated receipts from the aggregate amount of all the various sums which, by law, it is required to order

general funds, including surplus revenue from the sinking funds of the mayor, aldermen and commonalty of the city of New York and of any of the municipal and public corporations, or parts of the municipal and public corporations by this act consolidated with the municipal corporation known as the mayor, aldermen and commonalty of the city of New York, other than the surplus of revenues of any such sinking funds for the payment of interest on the city debt of the municipal corporation known as the mayor, aldermen and commonalty of the city of New York, or the like debts of the municipal and public corporations by this act consolidated as aforesaid, and the said board of aldermen is hereby authorized and directed to deduct the total amount of such estimated receipts from the aggregate amount of all the various sums which, by law, it is required to order and cause to be raised by tax in said year, for the purposes aforesaid, and to cause to be raised by tax only the balance of such aggregate amount after making such deductions. (*As amended by L. 1911, ch. 455.*)

§ 905. Exemptions from taxation. (See 3d Ed., p. 595.)

The provisions of the General Tax Law relating to exemptions from taxation repealed all prior general or special acts providing for exemptions from taxation whether the same are enumerated in the repealing clause or not. *People ex rel. Roosevelt Hospital v. Raymond*, 126 App. Div. 720, 111 N. Y. Supp. 177, rev'd on other grounds 194 N. Y. 189.

Property of a municipal corporation is not subject to taxation, whether it be employed for public use, or held in a private capacity in trust for the public. *People ex rel. Hollock v. Purdy*, 72 Misc. 122, 130 N. Y. Supp. 1077. Compare *Clark v. Sprague*, 113 App. Div. 645, 99 N. Y. Supp. 304.

Certiorari to review final determination of the department.
(See 3d Ed., p. 607.)

§ 906. A certiorari to review or correct on the merits any final determination of the board of taxes and assessments shall be allowed by the supreme court or any justice thereof, directed to the commissioners of taxes and assessments on the verified petition of the party aggrieved, but only on the grounds which must be specified in such petition, that the assessment is illegal, and giving the particulars of the alleged illegality, or that it is erroneous by reason of overvaluation, or in case of real estate, that the same is erroneous by reason of inequality, in that the assessment has been made at a higher proportionate valuation than the assessment of other real estate of like character in the same ward or section or other real estate on the tax-rolls of the city for the same year, specifying the instances

in which such inequality exists, and the extent thereof, and stating that he is or will be injured thereby. Such certiorari and all proceedings thereunder may be had and taken in the judicial district where such real estate is situated, and may be begun at any time before the first day of July following the time when the determination sought to be reviewed or corrected was made. (*As amended by L. 1911, ch. 455.*)

In *certiorari* proceedings, every presumption is in favor of the correctness of the assessment, and the relator is required to establish affirmatively that the judgment of the commissioners is erroneous. In determining the value of the capital stock of a domestic corporation, it is lawful to include the actual value of its real estate, and to deduct merely the assessed value thereof. *People ex rel. Bankers' S. D. Co. v. O'Donnel*, 54 Misc. 5, 105 N. Y. Supp. 457.

Where a taxpayer takes the assessment into court by *certiorari* under this section, asking for a reduction thereof, there is nothing in his action which implies a consent to have his assessment increased or a willingness to litigate that question, nor can the action of the commissioners of taxes and assessments in resisting his application for a deduction reasonably be construed into a notice from them that they will ask for an increase. *People ex rel. Kemp R. E. Co. v. O'Donnel*, 198 N. Y. 48, mod'g 133 App. Div. 894, 118 N. Y. Supp. 1133.

Allegations in a petition that the relator is aggrieved because an assessment of real property is fixed at a sum stated "which is erroneous, illegal and unjust by reason of overvaluation, the extent thereof being \$1,000,000, and your petitioner is aggrieved because the real property of your petitioner is assessed by the assessors aforesaid at an erroneous and excessive valuation," brings the case within the statute, vests the court with jurisdiction and requires the issue of the writ. *Matter of the City of New York*, 117 App. Div. 811, 103 N. Y. Supp. 87.

Where the petition sets forth facts showing that the percentage of increase of assessment on adjoining property was not so great as on the relator's property and the return denied that the assessed valuation complained of was illegal, excessive and erroneous by reason of inequality, *held*, that it was error to render judgment on the pleading; that the pleadings raised an issue of fact which should be submitted to a referee. *People ex rel. Bishop v. Feitner*, 116 App. Div. 452, 101 N. Y. Supp. 1021.

The petition on *certiorari* under this section alleging that the assessment valuations are erroneous by reason of overvaluation and inequality, and the return averring the correctness of the assessments, the petition and return perform the office of pleadings in an action, and present no issue involving the proposition that the assessed valuations as made were too small. Hence

there could not properly be a finding by the court to that effect. *People ex rel. Kemp R. E. Co. v. O'Donnel*, 198 N. Y. 48, mod'g 133 App. Div. 894, 118 N. Y. Supp. 1133.

A bank may institute proceeding by *certiorari* on behalf of its stockholders in relation to the assessment and taxation of its shares of stock. *People ex rel. Am. Ex. Nat. Bank v. Purdy*, 196 N. Y. 270.

Where twenty-one *certiorari* proceedings are brought by eight separate relators, and in the instance of every parcel of real estate, a review of the assessment for two or more years is asked, and the parcels upon which a review of assessment is asked are very valuable and testimony will be offered of experts whose time is so occupied that it might well be impossible to assemble them and keep them together for the purpose of trial in court, the court may exercise the discretion under the Tax Law (L. 1909, ch. 62) to refer the proceedings to various referees. *People ex rel. Stewart v. Feitner*, 53 Misc. 334, 104 N. Y. Supp. 794.

A writ of *certiorari* quashed under Tax Law (L. 1909, ch. 62) upon the ground that there was a misjoinder of parties, inasmuch as the persons united in the petition were not affected in the same manner by the alleged irregularities, errors or inequalities it appearing that the reductions asked in values were not uniform either as to owners or lots. *People ex rel. Litchfield v. O'Donnel*, 113 App. Div. 713, 99 N. Y. Supp. 436, aff'd 187 N. Y. 536.

Where taxes have been paid on lands which by error were assessed in The City of New York although the said lands had been severed from the city by statute, *held* that an action would lie to recover such payment, the same not being voluntary but made under a mutual mistake of fact. *Betz v. City of New York*, 119 App. Div. 91, 103 N. Y. Supp. 886, aff'd 193 N. Y. 625.

When assessment-rolls to be made and delivered to the board of aldermen. (See 3d Ed., p. 618.)

§ 907. Beginning with the first day in December in each year not a Sunday or a legal holiday the board of taxes and assessments shall cause to be prepared from the books of annual record of assessed valuations of real and personal estate in the several offices of the department of taxes and assessments in the several boroughs, assessment-rolls for each of said several boroughs, and shall, as soon as such rolls are completed, annex to each of said rolls its certificate that the same is correct in accordance with the entries in said several books of record. The rolls so certified must, on the first day of March in each year be delivered by the board of taxes and assessments to the board of aldermen, which shall meet at noon on that day at the city hall, or usual place of meeting, in the borough of Manhattan, for the purpose of receiving the same and for the purpose of perform-

ing such other duties in relation thereto as are prescribed by law; except that whenever said first day of March shall fall on Saturday, Sunday or a legal holiday, such rolls shall be delivered by said board of taxes and assessments on the next succeeding day thereafter not a Saturday, Sunday or a legal holiday to the board of aldermen, which shall meet at noon on such next succeeding day, at the place and in the manner and for the purposes herein specified. In the event of the board of aldermen failing to meet to receive said rolls, the same may be delivered to the city clerk, with the same effect as if delivered to the board of aldermen.

The board of aldermen, however, shall meet not later than the third day in March which is not a Saturday, Sunday or a legal holiday to fix the annual tax rates. In determining such rates the board of aldermen shall fix each rate in cents and hundredths of a cent upon each dollar of assessed valuation.

Within three weeks after the delivery of the assessment-rolls to the board of aldermen the board of taxes and assessments shall furnish to the supervisor of the City Record, a copy of the annual record of the assessed valuation of real estate, omitting from the said annual record two columns headed respectively "size of house" and "houses on lot." (*As amended by L. 1911, ch. 455.*)

In proceedings to review an assessment of a special franchise for inequality under Tax Law (L. 1909, ch. 62), in determining the irregularity, comparison must be made with the real and personal property on the assessment roll in the borough under this section, as distinguished from the proceeding for inequality under the city charter, when the comparison is made between the relator's assessment and the assessment of other property in the same ward or section or other part of the city. *People ex rel. Queens B. G. & E. Co. v. Woodbury*, 67 Misc. 481, 123 N. Y. Supp. 592.

Assessment-rolls to remain in custody of board of aldermen.

(See 3d Ed., p. 619.)

§ 909. The tax or assessment-rolls, when finally submitted to the board of aldermen shall remain in its custody, but the president of the board may, by written permission, permit access to them, and he is hereby, in the name of the board of aldermen and as its act, authorized and directed to cause to be properly estimated and computed the taxes annually imposed, and cause the same to be properly set down or extended in the several assessment-rolls or tax books, as required by the next section. It shall also be the duty of said president to cause the items of said taxes to be carefully added, and to set down the amount of the same therein; and when completed to deliver the tax books relating to real estate

to the comptroller, in order that the unpaid water rents, and the expenses of meters, with their connections and setting, water rates and other lawful charges for the supply of water measured by meters of any preceding year may be entered therein. After such completion of the assessment-rolls or tax-books it shall be the duty of the city clerk to procure the proper warrants authorizing and requiring the receiver of taxes to collect the several sums therein mentioned according to law, and such warrants need be signed only by the president of the board of aldermen, and countersigned by the city clerk, and immediately thereafter the president of the board of aldermen shall deliver the said assessment-rolls, with the warrants aforesaid annexed thereto, to the receiver of taxes, at the same time notifying the comptroller of the amount of taxes in each book, in order that he may cause the proper sum to be charged to the receiver for collection. (*As amended by L. 1911, ch. 455.*)

Corrected roll to be delivered to receiver of taxes. (See 3d Ed., p. 620.)

§ 911. The board of aldermen must also cause the assessment-rolls of each borough, when corrected according to law, and finally completed, or a fair copy thereof, to be delivered to the receiver of taxes in and for the city on or before the twenty-eighth day of March, with the proper warrant or warrants annexed, signed by the president of said board and countersigned by the city clerk, directing and requiring him to collect from the several persons named in the assessment-rolls the several sums mentioned in the last column of such rolls, opposite to their respective names, and to pay the same from time to time, when so collected, to the chamberlain of the city. (*As amended by L. 1911, ch. 455.*)

Receiver of taxes to give public notice. (See 3d Ed., p. 622.)

§ 914. The receiver of taxes shall, immediately after he shall have received the assessment-rolls, give public notice, for at least five days in the City Record and in such newspaper or newspapers published in the several boroughs as may be designated by the board of city record, or in default of any newspapers being published in any borough, in such newspaper or newspapers having a general circulation in such borough as the board of city record shall direct, that said assessment-rolls have been delivered to him and that all taxes shall be due and payable at his office in the said respective boroughs as follows:

All taxes upon personal property and one-half of all taxes upon real estate shall be due and payable on the first day of May and

the remaining and final one-half of taxes on real estate shall be due and payable on the first day of November. All taxes shall be and become liens on the real estate affected thereby on the respective days when they become due and payable as hereinbefore provided and shall remain such liens until paid.

The second half of the tax on real estate which is due as hereinbefore provided on the first day of November following the payment of the first half, may be paid on the first day of May or at any time thereafter, providing the first half shall have been paid or shall be paid at the same time, and on such payments of the second half as may be made in such manner prior to November first a discount shall be allowed from the date of payment to November first at the rate of four per centum per annum. (*As amended by L. 1911, ch. 455.*)

The taxes payable on the first Monday of October according to this section are for the fiscal year of the city which is coincident with the calendar year. *Platt v. Flower*, 66 Misc. 342, 123 N. Y. Supp. 536, *aff'd* 139 App. Div. 901, 123 N. Y. Supp. 538.

§ 915. Rebate for prompt payment. (See 3d Ed., p. 623.)

Repealed by L. 1908, ch. 447, §2.

Interest on unpaid taxes. (See 3d Ed., p. 623.)

§ 916. If any tax on personal estate or the first one-half of any tax on real estate shall remain unpaid on the first day of June, after it shall become due and payable it shall be the duty of the receiver of taxes to charge, receive and collect upon such tax so remaining unpaid on that day, interest upon the amount thereof, at the rate of seven per centum per annum, to be calculated from the day on which said taxes or such part thereof became due and payable, as provided by section nine hundred and fourteen of this act, to the date of payment; and such increase of percentage shall be paid over and accounted for by such receiver from time to time, as a part of the tax collected by him. If the final half of any tax on real estate shall remain unpaid on the first day of December, after it shall be due and payable, it shall be the duty of the receiver of taxes to charge, receive and collect upon such tax so remaining unpaid on that day, interest upon the amount thereof, at the rate of seven per centum per annum, to be calculated from the day on which said final half of said tax became due and payable, as provided by section nine hundred and fourteen of this act, to the date of payment; and such increase of percentage shall be paid over and accounted for by such receiver from time to

time, as a part of the tax collected by him. (*As amended by L. 1911, ch. 455.*)

Idem.; how collected. (See 3d Ed., p. 624.)

§ 917. It shall be the duty of the said receiver, in person or by his deputies, to charge, collect and receive upon all taxes or portions thereof remaining unpaid on and after the first days of June and December, respectively, as provided in section nine hundred and sixteen of this chapter, interest at the rate of seven per centum per annum to be calculated from the days on which the respective parts of said taxes become due and payable as provided by section nine hundred and fourteen of this act. (*As amended by L. 1911, ch. 455.*)

§ 918. Duty of receiver where taxes remain unpaid on the first of November following the delivery of assessments and warrants. (See 3d Ed., p. 624.)

Repealed by L. 1911, ch. 455.

§ 919. Public notice to be given by receiver after December first in each year. (See 3d Ed., p. 624.)

Repealed by L. 1911, ch. 455.

Undivided parts of taxes; payment of. (See 3d Ed., p. 624.)

§ 920. If a sum of money in gross has been or shall be taxed upon any lands or premises, any person or persons claiming any divided or undivided part thereof may pay such part of the sum of money so taxed, also of the interest and charges due or charged thereon, as the said comptroller may deem to be just and equitable. The department of taxes and assessments shall apportion the assessed valuation of such lands or premises when requested by the comptroller so to do, and shall certify such apportionment to him. The determination of the said comptroller shall be based upon such apportionment so certified. The remainder of the sum of money so taxed, together with the interest and charges, shall be a lien upon the residue of the land and premises only, and the tax lien upon such residue may be sold to satisfy such tax, interest or charges thereon, in the same manner as though the residue of said tax had been imposed only upon such residue of said lands or premises. (*As amended by L. 1908, ch. 490, § 3.*)

Corporation counsel to prosecute suits for personal taxes.
(See 3d Ed., p. 631.)

§ 933. The corporation counsel shall be charged with the prosecution of all suits or proceedings, in any court having jurisdiction,

for the collection of all cases of personal taxes sent to him by the receiver of taxes, or where, by any law of this state, any suit or proceeding may be instituted by such receiver, or any marshal acting under a tax warrant, in any court for the collection of any tax on personal property, and shall, subject to such control, act as counsel to the receiver of taxes, and to any marshal acting under the warrant of said receiver in the collection of any tax for personal property. The imposition of costs in such cases shall be discretionary with the court. (*As amended by L. 1908, ch. 12.*)

§ 934. Court to dismiss proceedings if satisfied that taxes on personal property cannot be paid. (See 3d Ed., p. 631.)

This section, giving power to dismiss a suit brought to enforce a tax on personal property was not intended to afford an additional remedy by way of review of the legality of the assessment depending upon no new facts, where the defendant failed to take *certiorari* proceedings within the time allowed for that purpose. *City of New York v. Assurance Co.*, 129 App. Div. 904, 113 N. Y. Supp. 419.

The defendant in an action to recover a tax levied on personal property is not restricted to the defenses specified by this section as the provisions of § 259a of the Tax Law are applicable to The City of New York, and provide that where it appears to the court just that a tax should not be paid, it may dismiss the suit on the payment of such part of the tax as may be just, or on the payment of costs. So *held*, holding it to be a good defense to such an action that the tax commissioners refused to allow the defendant to inspect the assessment-rolls during the period the same were open for correction and thereafter informed him that there was no assessment against him for personal property. *City of New York v. Halsey*, 132 App. Div. 192, 116 N. Y. Supp. 947.

An administrator is personally liable for taxes assessed against the estate and it is no defense to an action brought under this section that he has made a voluntary distribution of the estate. *City of New York v. Goss*, 124 App. Div. 680, 109 N. Y. Supp. 151.

The provisions of this section allowing the remission of costs in the discretion of the court where the persons taxed are unable to pay any tax has no application to a case where the suit is dismissed because brought against the wrong party. *City of New York v. Ackerman*, 51 Misc. 424, 101 N. Y. Supp. 687.

§ 936. Receiver; when may sue for personal taxes. (See 3d Ed., p. 633.)

A foreign corporation by appearing before the tax commissioners and applying in writing for a reduction of the assessment on its capital employed

within the state does not waive its right to immunity from personal for non-payment of the tax. No judgment for the tax can be rendered it, as the jurisdiction of the assessors was of the property and not person, and the enforcement of a tax against a non-resident must be a p ing *in rem*. *City of New York v. Mason Au. & M. Co.*, 64 Misc. 4 N. Y. Supp. 472.

Paving and repaving of streets; character of materials method of payment therefor. (See 3d Ed., p. 640.)

§ 948. Street pavement shall be divided into two classes, na Class "A" or permanent pavements, and class "B" or prelin pavements. Class "A" shall include all pavements of sheet as asphalt block, wood block, granite block or other materials that from time to time, be designated for this class by the board o mate and apportionment. Class "B" shall include all pave of bituminous macadam and such other pavements of less cost those used in class "A" pavements, that shall from time to be designated for this class by the board of estimate and appo ment. No street, or portion thereof, that shall have been paved class "A" pavement shall be repaved at the expense of the ac ing property-owners, unless the majority of the owners of the pro on the line of the proposed improvement shall petition for suc paving at their expense by assessment.

Whenever a street paved with class "B" pavement shall b paved, the repaving shall be done with class "A" pavement, u owners of property on the line of the proposed improvement pet the local board having jurisdiction for a second class "B" paven to be laid at the expense, by assessment, of the adjoining prop owners, and in such event second class "B" pavement shall be if said local board so orders, and the board of estimate and ap tionment consents. Whenever a class "A" pavement shall be to replace a class "B" pavement that has been laid at the exp of the property-owners by assessment, there shall be deducted f the cost of such improvement the cost of the class "B" pavem and the difference shall be paid by assessment upon the adjoin property, and the amount equal to the cost of said class "B" pa ment shall be borne and paid by the city. But in no case shall the of a second or additional class "B" pavement be so deducted f the amount to be assessed for the laying of a permanent or c "A" pavement.

The class of the original pavement of any street shall in all c be determined by the local board having jurisdiction and the bo of estimate and apportionment.

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Unpaid taxes and assessments, levied prior to January first, eighteen hundred and ninety-eight; special provision.

§ 937. All taxes, assessments and water rates levied before the first day of January, eighteen hundred and ninety-eight, by lawful authority, in any of the municipal and public corporations hereby consolidated, including the counties of Kings and Richmond, and that part of the county of Queens included in the city of New York as hereby constituted, and which shall remain due and unpaid and have or may become arrears of taxes, assessments or water rates, as provided by the laws relating to either of the municipal and public corporations hereby consolidated, shall become and be due and payable to and collectible by said city, and all tax and assessment lists relating to said unpaid taxes, assessments and water rates in the possession of any officer of any of said municipal and public corporations and counties hereby consolidated, shall be transmitted to and deposited with the comptroller or his duly authorized representative. All such lists shall thereupon be transmitted by the comptroller to the collector of assessments and arrears, to be collected by him, or by one of his deputies in accordance with the provisions of this act. (*As amended by L. 1912, ch. 461.*)

Paving and repaving of streets; character of materials; and method of payment therefor.

§ 948. Street pavements laid to be paid for, wholly or in part, by assessment shall be divided into two classes, namely: permanent pavements and preliminary pavements. The board of estimate and apportionment, as to pavements which shall be laid hereafter, shall, from time to time, designate the kinds of pavements to constitute each class. Pavements which were laid or authorized between January first, eighteen hundred and ninety-eight, and June twentieth, nineteen hundred and ten, the cost of which was assessed upon the property deemed to be benefited, and pavements, the cost of which

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 pavements the local board having jurisdiction for a second preliminary pavement, to be laid at the expense, by assessment, of the adjoining property owners, and in such event a second preliminary pavement shall be laid if said local board so orders, and the board of estimate and apportionment consents. Whenever a

Nothing herein contained shall be construed to relieve or release the owners of property, grantees of The City of New York, of or from any covenants to pave or repave or otherwise physically to improve any street or streets. (*As amended by L. 1910, ch. 546.*)

Temporary pavements.

The board of estimate has the power to authorize the construction of a temporary pavement on a street and impose the expense thereof upon the city and the court will not enter into the matter.

Award of damages for changes of grade; liability in such cases.

§ 951. All cases where a change of grade of any street or avenue has been made prior to the taking effect of this act shall, as to the liability to make compensation for damages caused by such change of grade, be governed by the laws in force at the time such change of grade was made. After the taking effect of this act there shall be no liability to abutting owners for originally establishing a grade; nor any liability for changing a grade once established by lawful authority, except where the owner of the abutting property has built upon or otherwise improved the property in conformity with such established grade, and such grade is changed after such buildings or improvements have been made. In such cases damages occasioned by such change of grade to such buildings and improvements shall be ascertained and assessed in connection with and as a part of the expenses of grading or otherwise improving the street or avenue in conformity with the grade as changed. A grade shall be deemed established by lawful authority within the meaning of this section where it was originally adopted by the action of the public authorities, or where the street or avenue has been used by the public as of right for twenty years, and been improved by the public authority at the expense of the public or of the abutting owners. All laws inconsistent herewith are hereby repealed. In case the grade of any such street shall be changed, and the same shall have been regulated and graded according to the new grade, after the certificate of the cost of such regulating and grading shall have been received by the board of assessors, it shall be the duty of the said board to cause to be published in the "City Record" and the corporation newspapers, for at least ten days successively, a notice which shall contain a request for all persons claiming to have been injured by the said change of grade to present, in writing, to the secretary of the board of assessors, their claims specifying a place where and a time when the said board will receive evidence and testimony of the nature and extent of such injury. After hearing and considering the said testimony and evidence the board of assessors shall make such awards for such loss and damage, if any, as it may deem proper. The amount of the said awards shall be included in the assessment for the regulating and grading of the street in question, as a part of the expense thereof, and the said award, and the proceedings of the assessors in relation

Unpaid taxes and assessments, levied prior to January first, eighteen hundred and ninety-eight; special provision.

§ 937. All taxes, assessments and water rates levied before the first day of January, eighteen hundred and ninety-eight, by lawful authority, in any of the municipal and public corporations hereby consolidated, including the counties of Kings and Richmond, and that part of the county of Queens included in the city of New York as hereby constituted, and which shall remain due and unpaid and

Nothing herein contained shall be construed to relieve or release the owners of property, grantees of The City of New York, of or from any covenants to pave or repave or otherwise physically to improve any street or streets. (*As amended by L. 1910, ch. 546.*)

Temporary pavements.

The board of estimate has the power to authorize the construction of a temporary pavement on a street and impose the expense thereof upon the city and the court will not enter into the question whether the pavement is in fact temporary except in a very clear case. *Sp. T., Kelly, J., Cohen v. City of New York*, January 26th, 1912.

§ 951. Award of damages for changes of grade; liability in such cases. (See 3d Ed., p. 643.)

The provisions of this section which provide that there should be no liability to abutting owners for originally establishing a grade, relates exclusively to assessment for local improvements other than those confirmed by a court of record and have no application to a proceeding for street opening. *Matter of Mayor (Perry Avenue)*, 118 App. Div. 874, 103 N. Y. Supp. 1069; *People ex rel. City of New York v. Lyon*, 114 App. Div. 583, 100 N. Y. Supp. 62, aff'd 186 N. Y. 545; *Matter of White Plains Road*, 106 App. Div. 133, 94 N. Y. Supp. 110.

The owners of property in villages incorporated into The City of New York by the Greater New York Charter are not deprived by this section of any right to compensation for change of grade given by the Village Law and the County Law. *Triest v. City of New York*, 55 Misc. 459, 105 N. Y. Supp. 571, aff'd 126 App. Div. 934, 110 N. Y. Supp. 1148, rev'd on other grounds, 193 N. Y. 525.

An abutting owner is not entitled to have damages for change of grade of a street in a village which became part of Greater New York, if his property was not improved or built upon prior to the establishment of the new grade. *Triest v. City of New York*, 193 N. Y. 525, rev'g 126 App. Div. 934, 110 N. Y. Supp. 1148, which aff'd 55 Misc. 459, 105 N. Y. Supp. 571.

Damages by reason of change of grade accrues at the time of the actual physical change, and the award therefor must be given to the person who was the owner of the premises affected at the time of such change of grade. *Nugent v. City of New York*, 58 Misc. 453, 111 N. Y. Supp. 439.

The city is not liable, under this section, to abutting owners for originally establishing a grade or for changing a grade once established by lawful authority, except where the owners of the abutting property have, subsequently to such establishment of grade, built upon or otherwise improved the property in conformity with such established grade, and such grade is changed after such buildings or improvements have been made. *Triest v. City of New York*,

193 N. Y. 525, rev'g 126 App. Div. 934, 110 N. Y. Supp. 1148, which aff'd 55 Misc. 459, 105 N. Y. Supp. 571.

In order to sustain the establishment of the grade of a street by user under this section it must appear not only that the street had been used by the public as of right for twenty years but that the same had been improved by the public authority at the expense of the public or abutting owner. Mere user for twenty years is not sufficient to establish the grade of a street. *People ex rel. Flaxman v. Hennessy*, 74 Misc. 166.

When the owner had notice to present objections to the assessment-roll of damages for change of grade, the failure to give the required notice of presentation of the petition to the local board and department of highways, is a mere irregularity, and such omission does not give the owner the right to recover in a case in which he would have had no claim for damages had the statute been complied with. *Triest v. City of New York*, 193 N. Y. 525, rev'g 126 App. Div. 934, 110 N. Y. Supp. 1148, which aff'd 55 Misc. 459, 105 N. Y. Supp. 571.

At common law, the owner of land abutting upon a public street is not entitled to consequential damages for the injury he may suffer by reason of a lawful change in the grade of the street upon which the property abuts. *People ex rel. Central Trust Co. v. Stillings*, 136 App. Div. 438, 121 N. Y. Supp. 13, aff'd 198 N. Y. 504; *People ex rel. Hallock v. Hennessy*, 146 App. Div. 441, 131 N. Y. Supp. 327.

As to damages for change of grade in streets in Twenty-third and Twenty-fourth wards of the city recoverable before the Grade Damage Commission created by L. 1893, ch. 537, as amended by L. 1894, ch. 567, and proceedings before such commission, see *People ex rel. Janes v. Stillings*, 197 N. Y. 548, rev'g 131 App. Div. 647, 116 N. Y. Supp. 138; *People ex rel. Central Trust Co. v. The Same*, 136 App. Div. 438, 112 N. Y. Supp. 13, aff'd 198 N. Y. 504; *People ex rel. City of New York v. The Same*, 138 App. Div. 168, 123 N. Y. Supp. 349; *People ex rel. Astor v. Stillings*, 68 Misc. 55, 124 N. Y. Supp. 929.

Assessments for grading streets and other property with material excavated in making other public improvements.
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§ 955. Whenever it is provided in any public contract that the earth or other material excavated in the course of the public improvement to which it relates shall be deposited under the direction of a president of a borough or other city official so that the same may be utilized in filling in any public streets, or for other lawful purposes, the value of the earth or other material so used and any other necessary cost and expense in the premises shall be certified to the board of estimate and apportionment by the president of the borough within whose jurisdiction the work is done,

or by such other city official having jurisdiction of the same, and said board shall thereupon determine whether any and, if any, what proportion of said amount shall be borne and paid by The City of New York, and shall certify to the board of assessors the aggregate amount of the value of the earth or other material and the other cost and expense as aforesaid, together with their determination in relation thereto. The board of assessors shall thereupon assess upon the property benefited the aggregate amount of such expense or such portion thereof as is authorized by law or such proportion thereof as may have been determined by the board of estimate and apportionment, in the same manner and with the same effect as other assessments for local improvements are made under the provisions of this title. (*As amended by L. 1910, ch. 550.*)

§ 958. Remedies for vacation of assessments, limited. (See 3d Ed., p. 647.)

Mandamus does not lie to compel the comptroller to accept a less sum than that assessed against the property by the board of assessors, even though the assessment be erroneous. The remedy of the landowner in such a case is limited to that prescribed by § 959, *post*. *Matter of Hagemeyer*, 113 App. Div. 472, 99 N. Y. Supp. 369.

§ 959. Petition to the Supreme Court in cases of fraud or substantial error. (See 3d Ed., p. 649.)

The court has no power under this section to review the action of the board of assessors in apportioning the cost of a local improvement among the property deemed by the board to be benefited thereby. The area of assessments for benefit and the method of apportioning the expense is a matter within the discretion of the board of assessors and not subject to judicial review. It seems that the court will grant relief under this section only where the assessment is not for a public purpose or where there is fraud or extravagance, or some essential element in the scheme of taxation is wanting. *Matter of Shaffer*, 138 App. Div. 35, 122 N. Y. Supp. 769, *aff'd* 200 N. Y. 519.

The courts will not review an assessment under this section on the ground of mere inequality where the assessment has been confirmed by the board of revision of assessment. The amount to be assessed against property for a local improvement and the area of the assessment are matters peculiarly within the jurisdiction of the board of assessors and the board of revision of assessment. *Matter of Sarah G. Fuller and Mary E. Halley*, 126 N. Y. Supp. 309.

The city cannot deduct from an award the amount of a wholly void assessment against the property for the local improvement. A different rule prevails when the assessment is not wholly void. In such a case, the property-

owner is confined to the remedy prescribed by §§ 958, 959, *ante*, and he cannot obtain a reduction of the amount of the assessment in proceedings to collect the award under § 1001, *post*. *Matter of City of New York (In re wharfage rights appurtenant to pier old No. 18)*, 114 App. Div. 519, 100 N. Y. Supp. 140.

Re-assessment. (See 3d Ed., p. 655.)

§ 964. Any lands which may be discharged from any lien for an assessment for any local improvement or as to which a sale of the tax lien thereon for such assessments authorized to be made by section ten hundred and twenty-seven of this act has been vacated or set aside may be again assessed by the board of assessors, after a public hearing, notice of which said hearing shall be published twice in each week for two successive weeks in the City Record and the corporation newspapers, for such amount as would have been justly chargeable if fraud or irregularity had not been committed; and the amount so assessed shall be a lien on said lands until paid, and shall be collectible in the manner provided by law for the collection of assessments, but all proceedings to make a new assessment shall be at the expense of the city. (*As amended by L. 1908, ch. 490, § 4.*)

Authority to open streets, et cetera. (See 3d Ed., p. 657.)

§ 970. The city of New York is authorized to acquire title either in fee or to an easement, as may be determined by the board of estimate and apportionment, for the use of the public to all or any of the lands required for streets, parks, approaches to bridges and tunnels, sites or lands above or under water for bridges and tunnels, and sites or lands above or under water, for all improvements of the navigation of waters within or separating portions of the city of New York, or of the water fronts of the city of New York, or part or parts thereof, heretofore duly laid out upon the map or plan of the city of New York, of the city of Brooklyn, of Long Island City or of any of the territory consolidated with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, or hereafter duly laid out upon the map or plan of the city of New York, as herein constituted, and to cause the same to be opened, or to acquire title as above stated to such interests in lands as will promote public utility, comfort, health, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and apportionment is authorized to specify what use is required of the lands which it may determine to be acquired for public use, and the extent of such use, and it is hereby authorized to change the map or plan of the city of New York in accordance with the provisions of this act, on this subject,

and to direct the same to be acquired whenever and as often as it shall deem it for the public interest so to do. The lands, tenements and hereditaments that may be required for such purposes may be taken therefor, and compensation and recompense made to the parties and persons, if any such there shall be, to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof, for the excess of the damage over and above the value of said benefit. The city of New York is authorized to make application or to cause application to be made, to the supreme court of this state in the first judicial department, when the lands to be taken are situated within New York county, and in the second judicial department, when the lands to be taken are situated in the counties of Kings, Queens or Richmond for the appointment of commissioners of estimate to ascertain and determine the compensation and recompense which should justly be made to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises proposed to be taken for any of the purposes aforesaid, and, in a proper case, for the appointment of one of such commissioners of estimate as a commissioner of assessment to assess the cost of such improvement or such proportion thereof as the board of estimate and apportionment directs, upon such parties and persons, lands and tenements as may be deemed to be benefited thereby. The board of estimate and apportionment may authorize as many proceedings to be joined in one application for the appointment of commissioners of estimate or commissioner of assessment as it may deem advisable for the public interest. In the latter proceedings, whether now pending or hereafter authorized, it may determine upon a partial or separate area or areas of benefit for the opening of a street or streets joined in one application or for as many streets as it may see fit, and authorize that a partial or separate report or reports containing both the awards for damage and the assessments for benefit be made by the commissioners of estimate and the commissioner of assessment and presented together for confirmation. Notice of a hearing upon such partial or separate area or areas of assessment may be given, as herein provided either before the application for the appointment of the commissioners of estimate and assessment or during the pendency of the proceeding. It may also include in a single proceeding contiguous premises to be acquired in more than one borough of the city of New York, and authorize the appointment of commissioners of estimate and a commissioner of assessment therefor, to be selected from any of the boroughs embracing the premises sought to be acquired, and it may make and determine

upon an area of assessment covering more than one borough in such and all other proceedings, and all the provisions of this title as amended shall be applicable thereto. The moneys collected upon the assessment of the commissioner of assessment shall be paid into the city treasury. The damages awarded by the commissioners of estimate shall become due and payable immediately upon the confirmation of the report of said commissioners of estimate. (*As amended by L. 1910, ch. 336, § 1.*)

The provisions of this section authorizing the taking of land for street purposes are general statutes and therefore confer no authority upon the city to take lands already devoted to a public use and which were also acquired by the exercise of the power of eminent domain. *Matter of Mayor (East 161st Street)*, 52 Misc. 596, 102 N. Y. Supp. 500.

In proceedings under this section, for opening and extending a public street, the street must be duly laid out, upon the map or plan of the city. If the proceeding be instituted when the proposed street does not appear upon any official map, the landowner is entitled to a dismissal of the proceeding. *Matter of City of New York (Boston Road)*, 142 App. Div. 726, 127 N. Y. Supp. 637.

Where the map of a proposed street was filed, and the action of the board of estimate and apportionment has duly vested title in the city, the proceeding does not fall by reason of a subsequent resolution of the board of estimate to close the proposed street by making it a part of a public park on the theory that by such subsequent action the street has disappeared from the map. *Matter of City of New York (Boston Road)*, 142 App. Div. 726, 127 N. Y. Supp. 637.

A resolution of the board of estimate and apportionment directing the corporation counsel to acquire title to lands required to extend a street "to the East River" authorizes the acquisition of lands between high water mark and the bulkhead line, since the purpose of extending the street is to afford access to the river. *Matter of City of New York (East 136th Street)*, 127 App. Div. 672, 111 N. Y. Supp. 916.

The provisions of this section authorizing the city to set off against an award for damages the value received by the remainder of the property through the improvement, does not apply where the land taken is exempted from assessment for local improvements. Accordingly, where a portion of cemetery lands are taken, the value of the benefit which the remainder of the lands has received through the improvement cannot be set off or deducted for the amount awarded the cemetery association for the land taken. *Matter of City of New York (Jerome Avenue)*, 120 App. Div. 201, 105 N. Y. Supp. 315, mod'f'd 192 N. Y. 459.

The public character of the ownership by a city of private property taken under the right of eminent domain continues during all the time the city pos-

sesses it, and the mere fact that said property is afterward found to be unnecessary for the object for which it has been condemned, works no change. *People ex rel. Hollock v. Purdy*, 72 Misc. 122, 130 N. Y. Supp. 1077.

Application for the appointment of commissioners. (See 3d Ed., p. 661.)

§ 973. Whenever the opening of any street or the acquisition of title to lands, tenements, and hereditaments for the purposes herein specified shall have been duly authorized and directed, as provided in this act, it shall be the duty of the corporation counsel immediately to institute a proceeding to acquire title for the use of the public to the lands, tenements, hereditaments and premises required therefor, and upon due notice by advertisement duly published in the City Record and the corporation newspapers for ten days, and by causing copies of the same in handbills to be posted for the same space of time in three conspicuous places adjacent to the property to be affected by the intended improvement, to make application to the supreme court, in the appropriate department thereof within the city, and in the manner appropriate to proceedings for the appointment of commissioners of estimate or of assessment or both, indicating in such application the land required for that purpose by reference to the maps on file in his office and referring to the area of assessment fixed by the board of estimate and apportionment. Upon such an application it shall be lawful for the said court to appoint three discreet and disinterested persons, being citizens of the United States, all of whom shall be residents of the borough where the property to be taken is located, commissioners of estimate and one of said commissioners of estimate, commissioner of assessment in said proceeding, for the performance of the duties in this title mentioned. Where a single street opening proceeding embraces land in more than one borough, the commissioners may be residents of any one of such boroughs. The person appointed both commissioner of assessment and of estimate shall be so designated in the order appointing the commissioners. The persons so appointed commissioners of estimate shall be subject to the right of challenge on the ground of interest, incapacity or disqualification to be exercised by the corporation counsel or by any person having interest in the said proceedings; and if any of them be rejected for good cause, or refuse to serve, then another shall be appointed in his stead by the court. Ten days' notice of the appointment of the commissioners of estimate, Sundays and holidays excluded, shall be published in the City Record and the corporation newspapers, and the corporation counsel shall cause a copy of such notice to be served by

mail or otherwise any time before the return day specified therein upon such parties or their attorneys as have filed a notice of claim or of appearance in the proceeding. The said notice shall specify the names of the persons appointed as commissioners and appoint a day when the parties may be heard at a special term of the supreme court as to the qualifications of the said commissioners. The persons named as commissioners of estimate shall attend at the time and place appointed and may be examined under oath as to their qualifications to act. Any ground of challenge which would disqualify a judge or juror shall be applicable to them, and any challenge must be tried and determined by the court in the mode described by the law in respect to the challenge of jurors, and such determination may be excepted to and reviewed as in the case of jurors. Where a challenge is sustained and a new commissioner is appointed, such new commissioner shall be subject to challenge in the same way, to be heard and determined by the court at such time as the court may direct. (*As amended by L. 1910, ch. 336, § 2.*)

Application to dismiss proceedings.

The remedy of a property-owner who desires to attack the right of the city to take certain lands for the purpose of a street is to move to vacate or modify the order under which the commissioners act and the question cannot be raised on motion to confirm the report of the commissioners under § 986, *post*. *Matter of Grand Boulevard & Concourse*, 33 App. Div. 210, 53 N. Y. Supp. 331; *Matter of Popham Ave.*, 55 Misc. 320, 106 N. Y. Supp. 482.

A motion to relieve the commissioners from the consideration of the value of certain parcels and to appoint new commissioners for those parcels is in effect a motion to remove the commissioners. *Matter of Bensel (Kensico Reservoir, Sec. No. 11)* 138 App. Div. 581, 123 N. Y. Supp. 365.

Who may act as commissioners; disqualifications.

The Supreme Court may, in the exercise of judicial discretion, remove commissioners appointed by it in condemnation proceedings upon an appropriate application. *Matter of Bensel (Kensico Reservoir, Sec. No. 11)*, 138 App. Div. 581, 123 N. Y. Supp. 365.

A commissioner is not disqualified merely because he has acted as counsel for property-owners in other proceedings for the taking of lands by the city. *In re Low*, 124 N. Y. Supp. 1050.

Nor is a commissioner disqualified because when acting as counsel in other proceedings he stated that the property-owner was entitled to the very highest amount that the commissioners believe should be paid to him. *In re Low*, 124 N. Y. Supp. 1050.

Although one commissioner may be disqualified, the fact that his associates sat with him while hearing some of the testimony does not disqualify them. *Matter of Bensel* (Kensico Reservoir, Sec. No. 11), 138 App. Div. 581, 123 N. Y. Supp. 365.

§ 974. Amendments of defects, et cetera. (See 3d Ed., p. 663.)

The court has power under this section to authorize an amendment relocating the lines of a proposed street. The commissioners already appointed in the proceeding may appraise the damage for taking the new land included within the relocation, without reappointment and without filing a new oath of office, especially where the owner of the lands appears in the proceedings both before and after the amendment. *Matter of City of New York* (Westchester Avenue), 126 App. Div. 839, 111 N. Y. Supp. 351.

§ 978. Commissioners to view and give notice of their appointment. (See 3d Ed., p. 666.)

Conflicting claims.

The fact that several persons or parties claim to have an interest in the same property does not necessarily make their claims conflicting. In order to create conflicting claims, as these words are employed in this section, two or more persons must claim the same interest or right. The interposition of a claim of lien or incumbrance does not, therefore, raise a dispute as to title; and the statute under consideration expressly provides that the taking of proof as to any lien or incumbrance shall be referred by the commissioners to their clerk or to the assistant corporation counsel. *Matter of City of New York* (Olivet Avenue), 70 Misc. 276, 127 N. Y. Supp. 218.

Commissioners to condemn land; powers of. (See 3d Ed., p. 666.)

§ 979. It shall be lawful for the commissioners of estimate and the commissioner of assessment duly appointed in proceedings authorized by this title to administer oaths. And the said commissioners may as a condition for the opening of a default, require the party applying therefor to pay the fees of the commissioners, and the clerical expenses of the commissioners, for the additional meeting or meetings of the commissioners made necessary by the fault of such parties. They shall reduce any testimony taken before them to writing. They may cause such maps or diagrams to be prepared if they deem the same necessary, as will enable or assist them to hear and determine the claims or interest of the said owners and persons interested. From the surveys and maps furnished to or prepared by them and such other information as the said commission-

ers shall possess or obtain, they shall cause diagrams to be prepared which shall distinctly indicate by separate numbers, the names of the owners of or the claimants to the respective plots or parcels of land to be taken or assessed by such proceeding and which shall also specify in figures with sufficient accuracy, the dimensions and bounds of each of said tracts or parcels so to be taken. In all cases the lots so assessed shall be designated on such maps by the same ward or block and lot numbers or other designations as shall be used to designate the said property on the tax books of the city of New York. Provided that in case any lot designated on such tax books shall not be assessed as a whole but either as to a part or in separate parts there shall be added to the designation such letters, numbers or figures or other description as may be necessary in order to indicate the exact parcel or parcels comprised in such tax lot which is or are assessed. In case an assessment shall be levied by a commissioner of assessment upon any entire borough or boroughs, it shall not be necessary to prepare the benefit maps aforesaid, but only to refer to the parcels assessed by reference to the block, lot and ward numbers as shown on the tax maps of said borough, but all subdivisions of any such lot or parcel shall be described as aforesaid. The said commissioners, before the completion of their estimate may obtain from the city of New York a profile or plan, if they shall deem the same to be useful, showing the intended regulation of the street or part of a street, with regard to the opening of which they have been appointed, as to the elevation or depression thereof, after the same shall be opened, extended, enlarged, straightened, altered, or otherwise improved, as the case may be; and also profiles or plans if they shall deem the same useful showing the intended regulation of the adjacent street or streets, as to the elevation or depression thereof, after such improvement. The said commissioners may require any board, department or officer of the city of New York to furnish them such surveys and maps as may be required by them. The corporation counsel is hereby authorized and required in case any board, department, or officer of the city of New York shall fail within three months after request duly made to said board, department, or officers in writing, to furnish the maps required by said commissioners of estimate and the commissioner of assessment to procure such maps, plans, profiles above mentioned, from the lowest bidder without advertisement, or he may reject all of such bids as often as he may deem it necessary. In such cases the expense thereof shall be chargeable against the fund for street and park openings and may be included in the assessment for benefit in each proceeding. (*As amended by L. 1909, ch. 394, § 2.*)

Commissioners to ascertain damages and benefit. (See 3d Ed., p. 668.)

§ 980. After hearing such testimony and considering such proofs as may be offered, the commissioners of estimate or a majority of them, all having considered the same, or having had an opportunity to be present, shall, without unnecessary delay ascertain and estimate the compensation which ought justly to be made by the city of New York to respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises so required for the improvement; and the commissioner of assessment shall make a just and equitable estimate and assessment, also, of the value of the benefit and advantage of such improvement to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises, not required for the said improvement, and all of said commissioners of estimate and the commissioners of assessment shall prepare separate abstracts of their estimate and assessment. The commissioner of assessment shall in making his estimate and assessment of the value of the benefit and advantage of the said improvement, assess any and all such lands, tenements, hereditaments and premises within the area or areas of assessment fixed and prescribed by the board of estimate and apportionment, as the area or areas of assessment for benefit, in proportion to the amount of benefit received. The board of estimate and apportionment is hereby authorized and required at the time of the adoption of the resolution directing the institution of proceedings to acquire title to the lands required for the improvement, or thereafter in the case of pending proceedings to fix and determine upon an area or areas of assessment for benefit in all proceedings authorized by it, and it shall have power to review and alter such area of assessment at any time before such assessment for benefit shall be completed and be confirmed by the supreme court, if it shall deem such action advisable. It shall also have power to divide the area or areas of assessment or partial or separate areas of assessment determined upon by it, into zones or sub-areas of benefit, and to direct what proportion, in percentages, of the cost and expense of the proceedings shall be made a charge upon and shall be distributed by the commissioner of assessment over and upon such zones or sub-areas of benefit in proportion to the benefit received. Said board shall give notice in the City Record and corporation newspapers when it is considering the advisability of instituting proceedings to acquire title, of the proposed area of assessment for each street or a number of streets, or of a separate area of assessment for each street in case

more than one street is joined in one proceeding, and of the proposed zones or sub-areas of benefit contained within the entire area of assessment, and of the proposed proportion in percentages of the cost and expense of the proceeding which it may direct to be distributed by the commissioner of assessment within such zones or sub-areas and of a hearing thereon. Similar notice shall be given of a proposed revision or alteration of the area or separate area of assessment theretofore fixed by it, or of the partial or separate areas of zones or sub-areas theretofore fixed by it, or of the percentages which it may direct to be distributed, levied and raised upon such areas. It may in any case determine whether any, and, if any, what proportion of the cost and expense of the proceedings authorized by this title shall be borne and paid by the city of New York, or by any entire borough or boroughs, and, may also determine in any proceeding or class of proceedings or generally that the expenses of the bureau of street openings incurred by reason of the provisions of this title, and that the cost and expense incurred by the respective borough presidents of the boroughs in which the property to be acquired is situated, in the preparation of rule, damage and benefit and tax-maps, shall be borne and paid by the city of New York, or by the property benefited in whole or in part, and the whole or remainder of such cost and expense, as the case may be, shall be assessed upon the property deemed by it to be benefited thereby. The respective borough presidents of the boroughs in which any property is directed to be acquired for purposes authorized by this title, shall, in the preparation of maps requested from them by the commissioners appointed in pursuance of this title, make a monthly return to the corporation counsel, verified by them, showing the names of persons employed, and the number of hours occupied by them in the preparation of these maps, and dates of the days of each month so occupied, their respective salaries, the amount of such salary apportioned to the expense thereof in each proceeding. Such returns shall be considered as presumptive evidence of the correctness of the expense thereof, which, if the board of estimate and apportionment so determines, shall be included in whole or in part of the assessment for benefit in any one of these proceedings after the same shall have been taxed by the supreme court in the manner provided for the taxation of the bills of costs of commissioners of estimate and assessment and of the commissioner of assessment appointed in such proceedings. The salaries of the persons so employed by the respective borough presidents or the proportionate share thereof chargeable to the preparation of rule, damage, profile and benefit maps, shall be paid monthly in the first instance out of

the fund known as the fund for street and park openings upon pay-rolls and vouchers, duly certified by the respective borough presidents, in the same manner as the employees of the bureau of street openings are paid. Whenever it shall direct that any part or proportion of the entire cost and expense of a proceeding shall be borne by any entire borough or boroughs it shall fix the compensation to be paid to the commissioner of assessment for making such distribution. The determination or decision of said board as to the proportion of cost and expense to be borne and paid by the city of New York, and as to the proportion to be borne by the property benefited, after it shall have been made and announced, shall be final, and such determination or decision shall not be reopened or reconsidered by said board. In all proceedings instituted before December thirty-first, nineteen hundred and one, and now pending, in which no portion of the cost of such proceedings has been assumed by or placed upon the city of New York, the board of estimate and apportionment may by resolution direct that such proportion of the cost thereof as it in its discretion shall deem just and equitable shall be borne by the city of New York. The said commissioner of assessment shall in no case assess any house, lot, improved or unimproved lands, more than one-half the value of such house, lot, improved or unimproved land, as valued by him. It shall be lawful for the said commissioner if he shall deem it just and equitable under the circumstances to do so, but not otherwise, to assess any part, not exceeding one-third part of the estimated value of any building or buildings taken in the proceeding, but not of any other improvement, upon the city of New York. If the said commissioners of estimate shall judge that any intended regulation will injure any building or buildings not required to be taken for the purpose of opening, extending, enlarging, straightening, altering, or improving such street or part of a street, they shall proceed to make, together with the other estimate and assessments required by law to be made by them, a just and equitable estimate and assessment of the loss and damage which will accrue, by and in consequence of such intended regulation, to the respective owners, lessees, parties and persons, respectively, entitled unto or interested in the said building or buildings so to be injured by the said intended regulation; and the sums or estimates of compensation and recompense for such loss and damage shall be included by the said commissioners in their report and included in whole or in part in the assessment for benefit, provided the board of estimate and apportionment so specifically directs. (*As amended by L. 1909, ch. 394, § 3.*)

Apportioning expense of improvement between city and property-owner.

The commissioners have no power to determine the question whether the assessment as a whole exceeds the benefit derived from the improvement. The power granted to the board of estimate to assess the whole cost of an improvement upon the property benefited, necessarily vests the board with the power to determine that the local benefits will equal the cost of the improvement. This determination of the board of estimate cannot be overruled by the commissioners whose powers are limited to apportioning the assessment among the property benefited. *In re Starr Street in Borough of Queens*, 73 Misc. 380, 131 N. Y. Supp. 71.

Where the board of estimate had passed a resolution providing that a certain part of the expense of an improvement should be borne by the property benefited and the remainder by the city, and the assessment was made and confirmed by the court and became a lien upon the property, *held* that a subsequent statute imposing the entire expenses of the improvement upon the city was not unconstitutional because the city had no vested right to the proportion of the expenses which had been assessed against the property benefited. *In re Lockett*, 58 Misc. 5, 110 N. Y. Supp. 32.

Area of assessment.

The provisions of the statute authorizing the board of estimate to fix the area of assessment for benefit is constitutional and valid. The apportioning of assessments for benefits has its foundation in the taxing power of the state and forms no part of the scheme of awarding compensation for the taking of property for public purposes. *Matter of City of New York (East 214th Street)*, 68 Misc. 89, 123 N. Y. Supp. 485.

It is the duty of the commissioner of assessment to assess all lands within the area of assessment prescribed by the board of estimate in proportion to the amount of benefit received. *Sp. T., Greenbaum, J. Matter of Opening 174th, 175th and 176th Sts., Aqueduct and Undercliff Aves., N. Y. Law Jour., December 9th, 1910.*

The increased burden which falls upon property-owners within the area of assessment owing to the exemption of lands used for cemetery purposes from assessments for local improvements, does not invalidate the assessment for benefit imposed upon the property-owners. *In re Starr Street in Borough of Queens*, 73 Misc. 380, 131 N. Y. Supp. 71.

Examination of witnesses.

It is error to allow expert witnesses upon redirect examination to testify in regard to sales of pieces of property about which they had not been interrogated on cross-examination. *Matter of The City of New York (Blackwell's Island Bridge)*, 118 App. Div. 272, 103 N. Y. Supp. 441.

General principles to be employed in estimating damage.

The commissioners are not authorized to go outside the area of the improve-

ment and award consequential damages to lands not embraced within it. City of New York (15th and 18th Streets), 56 Misc. 306, 107 N. Y. Supp. 567.

The measure of the compensation to be paid by the city to an owner whose property has been taken for public use is the fair market value thereof at the date of vesting of title in the city. Matter of City of New York (*In re Hamilton Place*), 67 Misc. 191, 122 N. Y. Supp. 660; Matter of City of New York (Avenue A), 66 Misc. 488, 122 N. Y. Supp. 321; Matter of City of New York (Titus Street), 139 App. Div. 238, 123 N. Y. Supp. 1018.

The commissioners should assess the damage not as of the day when the title to the first street bounding the block vested in the city, but should fix it as of the date when such street was actually opened for public use. Matter of Mayor, etc. (East 172d Street), 141 App. Div. 623, 126 N. Y. Supp. 284.

The commissioners should base their award upon the present market value of the premises, and not upon its future market value. Matter of Collis, 144 App. Div. 382, 129 N. Y. Supp. 214.

The price paid upon a *bona fide* sale of the same property about the time of vesting of title in the city thereof furnishes some, although not conclusive, evidence as to its value, but in the absence of evidence that it was sacrificed or its sale was forced or that other circumstances exist which would except the case from the general rule, it should be regarded as controlling. Matter of City of New York (Avenue A), 66 Misc. 488, 122 N. Y. Supp. 321; Matter of City of New York (*In re Hamilton St.*), 67 Misc. 191, 122 N. Y. Supp. 660.

The commissioners should not award the property-owner a sum largely in excess of the amount paid for other real property in the same vicinity at *bona fide* sales. *In re Boston Road in New York City*, 122 N. Y. Supp. 959.

The value of lands taken for a street cannot be established by showing what was paid for another parcel similarly situated. Matter of City of New York (Crotona Park), 142 App. Div. 665, 127 N. Y. Supp. 379. *Contra In re Manhattan Terminal*, 120 N. Y. Supp. 465.

The owner of lands cannot establish their value by testimony that he received certain offers for the property. Matter of City of New York (Crotona Park), 142 App. Div. 665, 127 N. Y. Supp. 379.

Damages should be awarded on the basis of acreage value and not on city lot valuation when the lands taken extend back hundreds of feet from the highway and no lots are destroyed but the front only cut off. Matter of City, of New York (Westchester Ave.), 126 App. Div. 839, 111 N. Y. Supp. 351.

Plottage is a percentage added to the aggregate value of two or more contiguous lots when held in one ownership as representing an increased value pertaining to a group of lots by reason of the fact that they admit of more ad-

vantageous disposition and improvement than a single lot. *People ex rel. P. N. Y. & L. I. R. R. Co. v. O'Donnel*, 130 App. Div. 734, 115 N. Y. Supp. 509.

A property-owner is not entitled as matter of law to an enhanced compensation by reason of the single ownership of several parcels of land. Whether an award should be made for plottage depends upon the circumstances of the case and is a proper subject for determination by the commissioners upon the evidence. *Matter of City of New York (15th and 18th Streets)*, 56 Misc. 306, 107 N. Y. Supp. 567; *In re Manhattan Terminal*, 120 N. Y. Supp. 465.

Value of buildings.

Where improved property is taken by the city for a street and the buildings are well adapted to the character of the land upon which they are erected and have an extrinsic value which must be added to the value of the land in order to ascertain the value of the whole, the owner may show the structural value of the building and the value of the land, separately, and the result of adding these two together though not a conclusive test of market value in all cases, is competent evidence of the same. *Matter of City of New York*, 198 N. Y. 84, rev'g 133 App. Div. 896, 118 N. Y. Supp. 1145; *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

Evidence of the actual rents received from property is competent evidence upon the question of its fee value in condemnation proceedings. *Matter of City of New York (Blackwell's Island Bridge)*, 118 App. Div. 272, 103 N. Y. Supp. 441.

Evidence of the supposed rental value of unimproved property if improved in a certain way, e. g., by the erection of apartment house and the cost of the property if so improved is not competent upon the question of the value of such property in proceedings to take the same. *Matter of the City of New York (Blackwell's Island Bridge)*, 118 App. Div. 272, 103 N. Y. Supp. 441.

The value of lands leased and used for business purposes is to be measured by the net income the owner derives from them. *Matter of City of New York (15th and 18th Streets)*, 56 Misc. 306, 107 N. Y. Supp. 567.

The commissioners may consider the peculiar benefit to premises leased for a long term to a liquor saloon by reason of their proximity to the entrance of a bridge. *In re Manhattan Terminal*, 120 N. Y. Supp. 465.

In the absence of evidence that premises are especially adopted for the purpose of a tenement house or that they were ever intended to be used for such purpose held, that the fact that the taking of part of the land prevented the remainder from being used for tenement house purposes did not of itself entitle the owner to increased damages since the commissioners may have found that the premises were more valuable for business purposes than if used for tenement house purposes. *Matter of City of New York (Roebing Street)*, 143 App. Div. 513, 127 N. Y. Supp. 944.

A property-owner is entitled to substantial damages for a building erected or placed upon the lands subsequent to the filing of a map of the public improvement. *Matter of City of New York (Briggs Avenue)*, 196 N. Y. 255, *id.*, 118 App. Div. 224, 102 N. Y. Supp. 1102; *Matter of City of New York (Baychester Ave.)*, 120 App. Div. 393, 105 N. Y. Supp. 214; *Matter of City of New York (In re Avenue D)*, 200 N. Y. 536.

Where, after proceedings for condemnation have been commenced, the owner of the land, acting in bad faith, places thereon a building which has been removed from other land, and which has thus become personal property, just compensation to such owner does not require that the building so moved upon such land shall be used to enhance his damages. Such a building should be treated as personal property and damages awarded accordingly. *Matter of City of New York (Briggs Avenue)*, 196 N. Y. 255. Compare *Matter of City of New York (Hawkstone Street)*, 137 App. Div. 630, 122 N. Y. Supp. 316, *aff'd* 199 N. Y. 567.

Consequential damage to lands not taken.

Where the proposed use of the property taken would depreciate the value of that which is not taken, such proposed use can be regarded and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. *People ex rel. City of New York v. Lyon*, 114 App. Div. 583, 100 N. Y. Supp. 62, *aff'd* 186 N. Y. 545.

Where the land taken is a portion of a greater tract which is used for one purpose, and the part taken and the buildings upon it are necessary for the purposes to which the whole tract has been devoted, the owner is entitled not only to the value of the land actually taken, but to the difference between the value of the plant as it was before the land was taken and its value after the taking. *Matter of City of New York (North River Water Front)*, 193 N. Y. 117, *rev'g* 125 App. Div. 393, 109 N. Y. Supp. 921.

The fact that the widening of the street by increasing the easements of light and air has made the property more desirable may be taken into consideration by the commissioners in determining the amount to be awarded as consequential damages to the portion of lands not taken. *Matter of City of New York (Roebling Street)*, 143 App. Div. 513, 127 N. Y. Supp. 944.

Consequential damage to buildings by regulation of grade.

An abutting owner is entitled to compensation for damage occasioned by the establishment of a new grade or a change of grade under this section. The provisions of § 951, *ante*, which provide that there shall be no liability to abutting owners for originally establishing a grade, relates exclusively to assessment for local improvements other than those confirmed by a court of record and has no application to a proceeding for street opening. *Matter of Mayor (Perry Avenue)*, 118 App. Div. 874, 103 N. Y. Supp. 1069.

The acquisition of the fee of a street already burdened with a public easement does not constitute such a taking of the residue of the property abutting

on the street as to entitle the owner to consequential damage arising from a change of grade occasioned by the improvement. *Sp. T., J. Greenbaum, Matter of Acquiring Title to Tremont Ave. (177th Street), N. Y. Law Jour., March 13th, 1911.*

Easements; abutting owner's fee in land taken.

An abutting owner who is also the owner of the fee of the street is entitled to substantial damages for the taking of the fee of a street for public improvement. *Rasch v. Nassau Electrical Railroad Co., 198 N. Y. 385. Compare Matter of City of New York, 135 App. Div. 630, 120 N. Y. Supp. 798.*

Where the city has acquired easements in a street, the fee of which is in the abutting owners, the latter are not entitled to the full value of the fee when the same is taken by the city but only to the value of the fee subject to the easements held by the city. *Matter of City of New York (Jerome Ave.), 120 App. Div. 297, 105 N. Y. Supp. 319.*

While an owner abutting upon an existing highway is entitled to substantial damages for the taking of the fee of the highway by the city, still the requirement of substantial damages is fulfilled by the awarding of a comparatively small sum. *People v. Hopkins, 126 App. Div. 839, 111 N. Y. Supp. 351.*

Where the original owner of lands retained nothing but a naked fee in a street which he dedicated to the public, he should be given a nominal, not a substantial award in a subsequent proceeding to open the street. *Matter of City of New York (Decatur Street), 196 N. Y. 286, rev'g 133 App. Div. 321, as explained in Rasch v. Nassau Electrical Railroad Co., 198 N. Y. 385; Matter of City of New York (Canal Street), 137 App. Div. 39, 121 N. Y. Supp. 435; Matter of Schneider, 136 App. Div. 444, 121 N. Y. Supp. 9, rev'd on other grounds, 199 N. Y. 581; Matter of City of New York (Beverly Road), 131 App. Div. 147, 115 N. Y. Supp. 208.*

Where an owner conveyed part of his property embraced within the map of a public improvement, retaining for himself a strip of land just wide enough for the street and good for little else, and protected the same by running covenants against easements, *held*, that the owner was entitled to substantial damages for the taking of the strip for the street, and that an award giving him nominal damages for the same was erroneous and should be reversed. *Matter of City of New York (In re Avenue D, Brooklyn), 200 N. Y. 536.*

Where the fee of a street is already incumbered by a right of way in favor of the abutting owner, such owners are not entitled to substantial damages when the bed of the street is taken by the city, for their easements are not destroyed thereby, but are perpetual. *Matter of Schneider, 136 App. Div. 444, 121 N. Y. Supp. 9, rev'd on other grounds, 199 N. Y. 581; Matter of Pinehurst Avenue, 67 Misc. 510, 123 N. Y. Supp. 344; Matter of City of New York (Edgewater Road), 138 App. Div. 203, 122 N. Y. Supp. 931, aff'd 199 N. Y. 560.*

Where land is burdened with an easement giving an elevated railroad a right to build its line over the same and the deed conveying the same provides that the road should always be fourteen feet above the street grade and an attached diagram of the right of way showed but one elevated pillar on the property, *held*, that the beneficial use of the lands was retained by the owner who had a right to build thereon, provided the structure did not interfere with the right of way conveyed, and that this was an element to be considered by the commissioners in awarding damages for the taking of the land for street purposes. *Matter of City of New York (Third Avenue)*, 145 App. Div. 244, 130 N. Y. Supp. 80.

Where an easement has been taken by the city for a public improvement and an award therefor has been made to the owner of the dominant estate, *held*, that the owner of the servient estate could not contest such award upon the ground that the dominant owner has been paid twice for the easement. *Matter of Daly*, 123 App. Div. 709, 108 N. Y. Supp. 635, *aff'd* 192 N. Y. 571.

Effect of dedication of fee by abutting owner.

Where lots composing a tract are conveyed by a common grantor with reference to a map upon which a street is laid down, the grantee of a lot acquires a private easement in such street for the purpose of access which is a property right, of which he cannot be deprived without compensation. The private easement thus acquired, however, does not extend to every block composing such street as shown upon the map, but terminates on reaching the next intersecting cross street or avenue on each side of the block of said street upon which the grantee's property abuts. The grantee is entitled to have that block upon which his lot abuts kept open, and likewise is entitled to have the ends of the block upon which his property abuts kept open where it is crossed by or comes into the intersecting street or avenue. The abutting owner, however, suffers no damage or injury by reason of the action of the city in closing a block of such street on the farther side of an intersecting street or avenue crossing the ends of the block upon which his property abuts. *Reis v. City of New York*, 188 N. Y. 58, *aff'g* 113 App. Div. 464, 99 N. Y. Supp. 291; to same effect see *Matter of City of New York (178th Street)*, 188 N. Y. 581; *Matter of Pinehurst Avenue*, 67 Misc. 510, 123 N. Y. Supp. 344; *Palmer v. East River Gas Co.*, 115 App. Div. 677, 101 N. Y. Supp. 374.

The fact that lots were sold by an owner as fronting upon a street laid down on a map does not constitute a dedication of the street as a public highway until accepted by the city as such, and therefore an owner of buildings cut through in laying out the proposed street is entitled to compensation in the absence of evidence tending to show that the city accepted such highway as a public street. *In re Starr Street in Borough of Queens*, 131 N. Y. Supp. 71; *Matter of City of New York (Van Alst Avenue)*, 143 App. Div. 564, 128 N. Y. Supp. 371, *aff'd* 203 N. Y., Memo., p. 44.

While the sale of lots as fronting upon a street laid down upon a map, creates private easements in favor of the abutting owner, the user of such

private easements, is not a public user sufficient to operate as an acceptance of the dedication; neither does mere travel by the public, without action by the authorities in repairing and maintaining or using it, constitute an acceptance of such road. A general user by the public at large, however, accompanied by official acts of the municipality in repairing, using or maintaining it, constitute an acceptance by common or public user. *In re Starr Street* in Borough of Queens, 73 Misc. 380, 131 N. Y. Supp. 71.

When an owner of lands conveys portions to grantees with easements of light, air and access over lands proposed to be taken for a public street, reserving to himself the fee of the proposed street, he can convey to the municipality no greater right in the fee of the street than he himself retains. Hence, such original owner by ceding the fee of the street to a municipality does not deprive his prior grantees of the right to compensation for damages to their property caused by a change of grade. *Matter of Mayor (Perry Street)*, 118 App. Div. 874, 103 N. Y. Supp. 1069.

Landlord and tenant.

The proper method of determining the respective interests of landlord and tenant in property taken for a public improvement is to first ascertain the market value of the premises as a whole without regard to the lease, and then to determine the value of the lease taking into consideration the rent reserved and the tenant's rights and obligations under the lease and its market value. The value of the lease thus ascertained should be awarded to the tenant and the difference between this sum and the value of the property as a whole constitutes the award to the landlord. *Matter of City of New York (Delancey Street)*, 120 App. Div. 700, 105 N. Y. Supp. 779; *In re Starr Street* in Borough of Queens, 73 Misc. 380, 131 N. Y. Supp. 71.

A tenant's right of renewal is appurtenant to the property and when destroyed on condemnation, the tenant is entitled to compensation therefor. *Matter of City of New York (North River Water Front)*, 118 App. Div. 865, 103 N. Y. Supp. 180, *aff'd* 189 N. Y. 508; *Matter of City of New York*, 118 App. Div. 865, 105 N. Y. Supp. 750.

A renewal of a lease without reserving the right to remove fixtures, extinguishes that right. *In re Starr Street* in Borough of Queens, 73 Misc. 380, 131 N. Y. Supp. 71.

A tenant under a lease entitling him to renewals, should be compensated for the taking of such permanent machinery as has been built into the building and used in connection with the leasehold for business purposes and which has little or no value when separated from the property. *Matter of City of New York (North River Water Front)*, 118 App. Div. 865, 105 N. Y. Supp. 750, *aff'd* 189 N. Y. 508.

Where commissioners in condemnation proceedings have awarded a certain sum for additions made to the premises by tenants which, in their opin-

ion, constituted "fixtures which the latter could remove," the basis of valuation on a settlement between the landlord and tenants of their respective rights in the fund thus produced should be the same as that under which the sum to be divided was originally produced, and where the commissioners had adopted a measure of present market value, it is erroneous to substitute in place thereof a "value, if any, . . . based upon the value of the particular property after it had been detached from the building at the expiration of the demised term . . . with the value of the use of said property for the unexpired term." *Matter of City of New York (North River Water Front)*, 192 N. Y. 295, mod'g 101 App. Div. 527, 92 N. Y. Supp. 8.

Upon the taking of a building containing trade fixtures, they are to be regarded as real property for the purpose of making compensation, and the tenant is under no obligation to remove them where his term has not expired, but the compensation therefor belongs to the tenant. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

The amount of compensation for trade fixtures should not be deducted from the amount previously determined to be just compensation to the owner of the land when the latter amount did not include the value of such trade fixtures. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

A tenant's right to remove fixtures is waived by failure to do so before the expiration of the lease. *In re Starr Street in Borough of Queens*, 73 Misc. 380, 131 N. Y. Supp. 70.

It is reversible error to limit an award to a tenant for trade fixtures to such property as is susceptible of removal from the building without injury to the property removed. *Matter of City of New York (North River Water Front)*, 192 N. Y. 295, mod'g 101 App. Div. 527, 92 N. Y. Supp. 8.

By the surrender of a lease to the landlord, the tenant necessarily parts with every claim of damage not only to the leasehold itself, but to everything appurtenant to that estate. *Matter of City of New York (North River Water Front)*, 193 N. Y. 117, rev'g 125 App. Div. 393, 109 N. Y. Supp. 921.

Where after the institution of proceedings by the city to take land for a public improvement, the lessor and lessee of the property enter into an agreement by which the lessee agreed to surrender and release to the lessor its lease and all claims which it as tenant had against the city for the condemnation of the property, but at the same time and in the same agreement, reserved, any claim it had, for injury to or destruction of its structures or fixtures resulting from the diminished value thereof caused by the severance of the property condemned by the city, *held*, that the agreement was simply one for the apportionment of the damage and that the lessee was entitled to an award for the consequential injuries sustained to its structures and fixtures. *Matter of City of New York (North River Water Front)*, 193 N. Y. 117, rev'g 125 App. Div. 393, 109 N. Y. Supp. 921.

Cemetery lands.

In determining the value of cemetery lands taken for a public improvement, *held*, that the amount for which separate graves may be sold, multiplied into the area of a cemetery, does not necessarily establish its market value. *In re Starr Street in Borough of Queens*, 73 Misc. 380, 131 N. Y. Supp. 71.

Weight of expert evidence on value.

Where the award is materially below the estimates of the expert witnesses on both sides, and no awards were made to life tenants for their interest in certain portions of said parcel, the report will be referred back for revision and correction. *Matter of City of New York (New Street)*, 63 Misc. 495, 117 N. Y. Supp. 409.

The commissioners should not arbitrarily and without justification award damages largely below the figure to which the city is committed by the testimony of its witnesses. *Matter of City of New York (Titus Street)*, 139 App. Div. 238, 123 N. Y. Supp. 1018.

The fact that the damages allowed are larger than the estimate of the city's experts, and smaller than the estimate of the property-owners' experts is no ground for disturbing the awards, the amount of which is left largely to the discretion of the commissioners. *Matter of City of New York (New Street)*, 63 Misc. 495, 117 N. Y. Supp. 409; *In re Manhattan Terminal*, 120 N. Y. Supp. 465.

Principles to be employed in assessing benefits.

The provision of the statute that assessments for benefit should be made by a single commissioner, is not unconstitutional. The apportioning of assessments for benefits has its foundation in the taxing power of the state, and forms no part of the scheme of awarding compensation for the taking of property for public purposes. *Matter of City of New York (East 214th Street)*, 68 Misc. 89, 123 N. Y. Supp. 485.

Under the provisions of this section, the commissioner of estimate may exercise an independent judgment with respect to the value of the land for the purpose of assessment. The section imposes no restriction upon the manner in which the commissioner of assessment shall arrive at the values which he determines, and he is not required to take the valuation of the commissioners of estimate, as his own, any more than he is required to adopt the valuation of the tax commissioners. *Matter of City of New York (Thayer Street)*, 142 App. Div. 721, 127 N. Y. Supp. 396.

The commissioner of estimate may take into consideration the enhanced value of the land due to the improvement itself, in determining the value of the property for the purpose of assessment. *Matter of City of New York, (Thayer Street)*, 142 App. Div. 721, 127 N. Y. Supp. 396.

Unless it appears that one piece of property has been benefited more than another similarly situated by the opening of a street, the proper rule to be applied by the commissioner of estimate in assessing for benefits, is to assess the cost of the land taken for each block of the street upon the property fronting on that block, or, in other words, to make each block pay for the lands taken from such block. *Matter of City of New York (East 136th Street)*, 127 App. Div. 672, 111 N. Y. Supp. 916; *Matter of Pinehurst Avenue*, 67 Misc. 510, 123 N. Y. Supp. 344.

The rule which requires the commissioner of estimate to impose the assessments for benefits in such manner as to make each block pay for the land taken for each block is not an inflexible one. Where the extension of a street largely benefits the surrounding neighborhood as well as property fronting thereon, the "block rule" of assessment for benefits should not be applied. *Matter of City of New York (East 136th Street)*, 127 App. Div. 672, 111 N. Y. Supp. 916.

Where part of the land benefited by a street is inferior land to which there was no access, while the rest of the property already fronted on a macadamized street, *held* that the assessment for benefit should not be made in accordance to the block to block rule, but that each parcel of land should be assessed porportionately to the benefit actually received. *Matter of City of New York (Spofford Avenue)*, 126 App. Div. 740, 111 N. Y. Supp. 334.

Where a proposed street cuts diagonally through certain lots which already had frontage on an avenue, leaving gores of little value, and the owner was awarded the value of the land taken and consequential damage to the remainder, *held* that an assessment for benefit of the difference between the value of the gores remaining in the property-owner with and without the improvement was proper. *In re Starr Street in Borough of Queens*, 73 Misc. 380, 131 N. Y. Supp. 71.

A lot having a space of twenty-five feet between it and the building on the adjoining property, giving it light and air on three sides, should not be treated as an ordinary inside lot, although the city owned the adjoining property and might build upon it. *Matter of Amsterdam Avenue*, 53 Misc. 342, 104 N. Y. Supp. 821.

Where the commissioner of assessment did not impose upon the city any part of the estimated value of buildings taken in the proceeding, *held*, that the commissioner should not be required to state whether he considered the question and why no such allowance was made, at least in the absence of anything to show why such an allowance should have been made. *Matter of City of New York (East 214th Street)*, 68 Misc. 89, 123 N. Y. Supp. 485.

Assessment of more than one-half in value.

The provision of this section that lands shall not be assessed for more than one-half their value, contemplates that the value considered shall be that

which the property possesses after the improvement is made, and not that which the property had prior to the institution of the proceedings. Accordingly the commissioner is justified in adding to the value of such lands, the sum which the lands will be benefited by the improvement. *Matter of City of New York*, 122 App. Div. 416, 106 N. Y. Supp. 889, *aff'd* 192 N. Y. 575.

Exemption of cemeteries from assessment for benefit.

A cemetery association under L. 1879, ch. 310, § 1, is exempted from the payment of an assessment for benefit in proceedings for the opening of streets. The exemption applies not only to a case where the cemetery lands are within the area of assessment, but likewise to a case where part of the cemetery lands have been taken. Accordingly, where a portion of cemetery lands are taken, the value of the benefit which the remainder of the lands has received through the improvement, cannot be set off or deducted from the amount awarded the cemetery association for the land taken. *Matter of City of New York (Jerome Avenue)*, 192 N. Y. 459, *modf'g* 120 App. Div. 201, 105 N. Y. Supp. 315; *In re Starr Street in the Borough of Queens*, 73 Misc. 380, 131 N. Y. Supp. 71.

An assessment for benefit against a cemetery association cannot be sustained upon the ground that although the same cannot be enforced *in presenti*, it may be enforceable when the lands ceased to be used for cemetery purposes. *Matter of City of New York (Jerome Avenue)*, 192 N. Y. 459, *modf'g* 102 App. Div. 201, 105 N. Y. Supp. 315; *Matter of Mayor (Perry Avenue)*, 118 App. Div. 874, 103 N. Y. Supp. 1069.

The exemption from assessment conferred upon cemetery associations by L. 1879, ch. 310, §§ 1 and 2 applies not only to the land actually occupied by graves but to all lands held exclusively for cemetery purposes. *Matter of the Mayor (Perry Avenue)*, 118 App. Div. 874, 103 N. Y. Supp. 1069.

A portion of the lands of a cemetery association which was formerly included within the lines of an abandoned highway, is subject to assessment, as such lands are not actually occupied and used for cemetery purposes at the time the assessment is made. *Matter of the City of New York (Jerome Avenue)*, 192 N. Y. 459, *modf'g* 120 App. Div. 201, 105 N. Y. Supp. 315.

Where the report of the commissioners was sent back for correction and revision, and intermediate the confirmation of the original report and the making of the supplemental and additional report, a parcel of land involved in the proceeding was purchased by a cemetery association, *held*, that the cemetery association was not exempted from assessment upon such property. *Matter of City of New York (Jerome Avenue)*, 145 App. Div. 865, 130 N. Y. Supp. 609.

Exemption of railroad property from assessment for benefit.

Property acquired by a railroad for railroad purposes cannot be substantially assessed for a street improvement in its vicinity, since its value for the

purpose to which it is devoted is not enhanced by the improvement. A nominal assessment only should be imposed. *Matter of City of New York (East 136th Street)*, 127 App. Div. 672, 111 N. Y. Supp. 916.

A railroad is not entitled to exemption from assessment on property not used or intended to be used as part of its existing system, but intended to be used for a proposed system for which no franchise has been obtained, and the intended construction of which may at any time be abandoned. *Sp. T., Greenbaum, J., Matter of Opening Taylor Street, N. Y. Law Jour.*, December 10th, 1910.

Set-off against award.

See cases cited under § 1001, *post*.

Costs and fees.

The fees of the commissioners may be taxed upon the property embraced within the area of assessment. *Matter of City of New York (East 214th Street)*, 68 Misc. 89, 123 N. Y. Supp. 485.

The fees paid by the city to its expert witnesses should be taxed against the owners of property embraced within the area of assessment. *Matter of City of New York (East 214th Street)*, 68 Misc. 89, 123 N. Y. Supp. 485.

Executor and administrator.

Title to an award for property taken by the city vests in the administrator upon the death of the owner. *Matter of Ruebel*, 52 Misc. 604, 103 N. Y. Supp. 804.

Life tenant.

A life tenant of land taken by the city is entitled to the use of the sum awarded for the land until the termination of the life estate, but such life tenant will be required to give adequate security for the benefit of the remaindermen before receiving the award. *In re Gilroy*, 60 Misc. 125, 112 N. Y. Supp. 111, *aff'd* 128 App. Div. 899.

Partnership property.

An award to two persons owning the property as copartners should not be amended by striking out the name of the deceased partner, although the surviving partner has accounted to his administrator upon the theory that the lands in question were partnership property where it does not appear that the heirs at law of the deceased partner were parties to the accounting. *Matter of Canal Place*, 65 Misc. 634, 122 N. Y. Supp. 357.

Where pending proceedings by the city for the acquisition of property owned by partners, one of them transfers all his right, title and interest in the partnership's property to the other, the latter is entitled to all of the

award made by the commissioners for the taking of the property. *Rosenbaum v. City of New York*, 129 App. Div. 351, 113 N. Y. Supp. 364.

Accretion.

A claim to an award based upon the contention that the lands had been increased by accretion from the water front, *held*, not sustained by the evidence. *Matter of Smith*, 137 App. Div. 652, 122 N. Y. Supp. 281.

Executory contract for sale of real property.

An executory contract for the purchase and sale of lands is not abrogated by reason of the subsequent taking of such lands for public purposes under the power of eminent domain, and therefore the vendee cannot recover from the vendor an installment of the contract price paid by him after the institution of the proceedings to take the land. The damages awarded for the lands in the condemnation proceeding belong to the vendee subject of course to the lien of the vendor, and if the latter receives them he does so as trustee for the former. *Clark v. Long Island Realty Co.*, 126 App. Div. 282, 110 N. Y. Supp. 697; to same effect, *Matter of City of New York (Edgewater Road)*, 138 App. Div. 203, 122 N. Y. Supp. 931, *aff'd* 199 N. Y. 560.

Mortgage.

Where a portion of property covered by a mortgage is taken by the city during the pendency of an action to foreclose the mortgage and the award for the property taken is made to the mortgagor, *held*, that the resort should be had to the proceeds of the sale of the mortgaged property for the payment of accumulated taxes and assessments before moving to have the award applied for that purpose. *Woolf v. Leicester Realty Co.*, 134 App. Div. 484, 119 N. Y. Supp. 288.

Where part of a parcel of real property covered by a mortgage is taken by the city for a street and thereafter the mortgage is foreclosed and a deficiency judgment is rendered against the owner, *held*, that the mortgagee is entitled to so much of the award for the property taken as will satisfy the deficiency judgment against the owner. *Matter of the Mayor (Morris Avenue)*, 118 App. Div. 117, 103 N. Y. Supp. 180.

Where the city acquired an easement in property pending a foreclosure suit and made an award for the same to the mortgagor *held*, that the judgment in the foreclosure suit should be amended so as to exempt the easement acquired by the city from a sale thereunder. *Woolf v. Leicester Realty Co.*, 134 App. Div. 484, 119 N. Y. Supp. 288.

Transfer of property pending proceedings.

A transfer of property made before title thereto has vested in the city, conveys to the grantee the right to the award therefor. *Rosenbaum v. City of New York*, 59 Misc. 30, 109 N. Y. Supp. 775, *aff'd* 129 App. Div. 351; 113 N. Y. Supp. 364. *In re Newtown Creek Bridge in City of New York*, 128 App. Div. 150, 112 N. Y. Supp. 531, *aff'd* 195 N. Y. 527.

The right to an award for lands taken vests in the owner personally, and his subsequent conveyance of the premises does not transfer the award to the grantee unless specifically assigned in the deed. *Matter of May, etc., of New York (Trinity Avenue)*, 116 App. Div. 252, 101 N. Y. Supp. 613; to same effect see *Harris v. Kingston Realty Co.*, 116 App. Div. 704, 101 N. Y. Supp. 1104; *Matter of Reubel*, 52 Misc. 604, 103 N. Y. Supp. 804; *Matter of City of New York (Beverly Road)*, 131 App. Div. 147, 115 N. Y. Supp. 208; *Matter of Opening Hamilton Street*, 144 App. Div. 702, 129 N. Y. Supp. 317.

Where the city took title under § 990, *post*, to a part of a tract of land and the owner thereafter conveys the entire tract including the part taken by the city by a full covenant warranty deed, *held*, that the conveyance constituted a breach of the covenants contained therein, and that the award of the commissioners for the part of the land taken will be considered as the measure of damages for the breach of such covenants, and pass to the grantee not under the conveyance but as a remedy under the covenants. *Matter of Hamilton Street in Queens Borough*, 69 Misc. 369, 127 N. Y. Supp. 1045.

Abstract of estimate and assessment to be deposited. (See 3d Ed., p. 682.)

§ 981. The said commissioners of estimate and the commissioner of assessment shall deposit at the same time in the bureau of street openings in the law department their respective abstracts of their estimate of damages or assessment for benefit at least twenty days before their respective reports shall be presented to the court for confirmation, which abstracts shall be accompanied by copies of the diagrams used by them and which shall refer to the numbers thereby indicated, and state the several sums respectively estimated for or assessed upon each of said parcels with the name or names, claimant or claimants, so far as ascertained by said commissioners. Whenever the board of estimate and apportionment shall direct that a part of the cost and expense of the proceeding shall be levied on any entire borough or boroughs, it shall not be necessary to attach to the abstract of estimated assessment for benefit made by the commissioner of assessment, nor to his report, any assessment maps; but he shall refer in the tabular abstract of estimated assessment made by him to the parcels assessed for benefit as they are shown and delineated on the tax maps of said borough or boroughs as prepared and kept by the department of taxes and assessments for the current year for the levying and payment of taxes in which such tabular abstract of estimated assessments or tabular abstract assessment has been prepared and filed and presented to the supreme court for confirmation. Should any changes occur in the size or area of the parcels of property proposed to be assessed by subdivision or

otherwise, said commissioner of assessment is authorized to make an apportionment of any proposed assessment rendered necessary by any variance between any parcel designated by the block, lot and ward number as shown on the tax maps of any borough at the time of the preliminary filing of the abstract of assessment for benefit, and as shown on said tax maps, at the time his report shall be presented to the supreme court for confirmation. The respective borough presidents shall furnish to the bureau of street openings sets of the tax maps of each borough in duplicate for filing therein and for convenience of reference thereto in the reports of the commissioners of assessments. The surveyor of the department of taxes and assessments shall make and furnish all necessary surveys and corrections of the ward maps as may be necessary to keep the maps furnished to the bureau of street openings for the purposes of assessment for benefit as accurate as practicable. They shall also deposit all the affidavits and proofs used by them in making their abstracts. They shall also publish a notice for fifteen days in the City Record and in the corporation newspapers and when authorized pursuant to this act, in not more than one newspaper published in the borough in which the property is located, stating their intention to present their reports for confirmation to the said court at a time and place to be specified in said notice, provided there be no objection to either of said abstracts, and also that all persons interested in such proceedings, or in any of the lands affected thereby, having any objection thereto, shall file the same, in writing, duly verified, with said commissioners within twenty days after the first publication of said notice, and that the said commissioners will hear parties so objecting at a place and at a time after the expiration of said twenty days, to be specified in said notice. Similar notice for at least ten days shall be given of any new, supplemental or amended abstracts, but said abstracts shall be refiled for ten days only for objections thereto. At the time and place named in said notice the said commissioners shall hear the person or persons who have objected to the said abstracts, and who may then and there appear, and shall have the power to adjourn from time to time until all such persons shall be fully heard. In case objections are filed to these abstracts or any one of them, the motion to confirm the reports as to awards and as to assessments shall stand adjourned until a date to be specified in the notice hereinafter provided for in relation to filing the final reports. Except as herein otherwise provided, the report as to awards and the report as to assessments must be noticed for and brought on for confirmation at the same time and place. (*As amended by L. 1909, ch. 394, § 4.*)

Objections to report.

Objections which must be considered by the commissioners in the first instance, may not be filed after the commissioners have filed their final report, at least unless that report is returned to them. *Seem* that the court has power to relieve a party of the consequence of a default. *In re Commissioner of Public Works* (Appellate Division), 133 N. Y. Supp. 251.

Ordinarily only such objections can be passed upon by the court on motion to confirm the report under § 986, *post*, as were duly filed by the objecting property-owner in the manner prescribed by this section. Where, however, it convincingly is shown that the objector through accident or other satisfactory cause was not aware of the proceeding affecting his property and in good faith failed to appear therein and where laches may not be properly imputed against him, the court may refer the report to commissioners for revisal and correction, so that an opportunity may be accorded the objector to present evidence in support of his contention of an unjust assessment. Relief will not be granted except upon the strongest evidence, and the court in its discretion may require the objector to submit to an examination by the corporation counsel respecting the facts of his alleged ignorance of the pending proceeding. *Matter of Opening Weiher Court from Washington Avenue to Third Avenue*, Greenbaum, J., N. Y. Law Jour., October 8th, 1908.

The refusal of the commissioners of estimate and assessment to receive further testimony as to the value of property to be assessed upon the hearing of objections to the report under this section does not render the report invalid. The provisions of this section permitting the landowner to file objections to the abstract of estimate, contemplates merely a hearing upon objections and not a retrial upon the merits. The right to introduce further testimony upon the hearing of objections rests entirely within the discretion of the commissioners, and in the absence of any proof tending to show any abuse of such discretion the courts will not intervene. *Matter of Graham Avenue*, 69 Misc. 381, 126 N. Y. Supp. 160.

Reports; what to contain. (See 3d Ed., p. 686.)

§ 985. The reports of the commissioners shall consist of the diagrams hereinbefore referred to, duly corrected, when necessary, except in the case of an assessment to be levied upon any entire borough or boroughs, with a tabular abstract of the estimate of damages and a tabular abstract of the assessment for benefit respectively, with any corrections or alterations thereof by said commissioners, showing fully and separately to the said court the amount of loss and damage, and of benefit and advantage to each and every owner, lessee, party and person entitled or interested in any lands, tenements, hereditaments, or premises affected by the improvement. In said reports the commissioners who shall make the same shall set forth the names of the respective owners, lessees, parties and

persons entitled, unto or interested in the said lands, tenements, hereditaments, and premises mentioned in the said report, and each and every part and parcel thereof as far forth as the same shall be ascertained by them, and an apt and sufficient designation or description of the respective lots or parcels of land and other tenements, hereditaments and premises that may be required for the purpose of opening such street or park, or part thereof, so to be opened, as the case may be, or that may be required for the purposes herein mentioned, and also of the said respective lots or parcels of land and other tenements, hereditaments and premises not included within but deemed to be benefited by the same, and so assessed by the said commissioner for the said benefit as aforesaid. Said reports shall refer to the number of the tracts and parcels indicated, by said diagrams, except in the case of an assessment to be levied on any entire borough or boroughs, and state the several sums respectively estimated for as assessed upon each of said tracts or parcels, with the name or names of the owners or claimants of each, if ascertained by said commissioners. In case the board of estimate and apportionment shall direct that a certain proportion of the cost and expense of any proceeding shall be imposed by the commissioner of estimate upon any entire borough or boroughs, it shall be sufficient in his tabular abstract of estimated assessments, and in his tabular abstract of final assessments to refer to the respective lots or parcels of land and other tenements, hereditaments and premises deemed to be benefited by the improvement by reference to their block, lot and ward number on the tax maps of said boroughs as prepared by the tax commissioners of the city of New York, in the manner heretofore provided in section nine hundred and eighty-one of this act.

Whenever the said commissioners shall be unable to ascertain with a sufficient certainty the name of any owner of any parcel of said lands, they shall indicate such parcel upon the diagram embracing it, as belonging to unknown owners. It shall not be necessary in said reports to describe any of the said tracts or parcels by metes and bounds, but only by reference to the said diagrams, except in the case of an assessment upon any entire borough or boroughs. Said reports shall also set forth the several and respective sums estimated and assessed as and for the compensation and recompense, or the allowance to be made for the loss and damage, or for the benefit, as the case may be of the respective owners of the fee or inheritance of such lands, tenements, hereditaments and premises respectively, and for the loss and damage, or for the benefit, as the case may be, of the respective owners of the leasehold estates or other interests therein separately; but in all, and each and every case

and cases where the owners and parties interested, or their respective estates and interests are unknown, or not fully known, to the said commissioners, it shall be sufficient for them to estimate and assess and set forth and state in their said reports, in general terms, the respective sums to be allowed and paid to or by the owners and proprietors generally of such said lands, tenements, hereditaments and premises, and parties interested therein for the loss and damage, or for the benefit and advantage, as the case may be, to such owners, proprietors, and parties interested in respect of the whole estate and interest of whomsoever may be entitled to, unto or interested in the said lands, tenements, hereditaments and premises respectively, by and in consequence of the said operation and improvement of opening, laying out, and forming or extending, enlarging, or otherwise improving the said street or park or section thereof so to be opened, or so to be laid out and formed or extended, enlarged, or otherwise improved, or by and in consequence of the acquisition of said property for the purposes herein mentioned, as the case may be, without specifying the names of the estates or interests of such owners and proprietors and parties interested, or of any or either of them. Said commissioners of estimate in a proceeding, embracing only one street, may, when authorized by a majority vote of all the members of all the board of estimate and apportionment, make up and file a preliminary abstract of their estimate of damages embracing either the entire lands, tenements, hereditaments and premises to be acquired or successive sections or parcels thereof, and ascertain and estimate the compensation to be made thereon, and make a separate report with reference thereto. Such separate or partial report shall be made in the same form and manner, and such proceedings shall be had in respect thereto, as in respect to the report of the commissioners relative to the entire lands taken as herein provided for. In case the board of estimate and apportionment so directs, the commissioner of assessment may make up and file a preliminary abstract of his estimate of benefits, and a final report in relation thereto in cases where more than one street is joined in any one application for the appointment of commissioners of estimate and commissioner of assessment in any proceeding, when said board directs a partial or separate abstract of awards and partial and separate report relative thereto to be made therein, but he must notice the same and bring the same on for confirmation at the time that any separate report as to award for damages is authorized to be brought on for confirmation. Where partial reports as to awards for damages are authorized to be made in proceedings for the opening of a single street, the final partial abstract and report as to awards

when there is more than one, and the final abstract and report as to assessments for benefit, shall be made up and filed and brought on for confirmation at the same time and place. (*As amended by L. 1909, ch. 394, § 5.*)

Award to unknown owners.

The commissioners should not pass upon conflicting claims of title, but should in such cases report without specifying the names or estates of owners, and generally say that the land belongs to unknown owners. Matter of Commissioner of Public Works, 135 App. Div. 561, 120 N. Y. Supp. 930; Matter of City of New York (Olivet Avenue), 70 Misc. 276, 127 N. Y. Supp. 218.

Partial report.

Where the board of estimate and apportionment authorizes the commissioners to make a separate or partial report of the awards, a report embracing all of the awards to be made may be confirmed before the local assessment to defray the portion of the expense to be raised in that manner has been made and presented for confirmation. Matter of City of New York (West 162d Street), 125 App. Div. 485, 109 N. Y. Supp. 950, *aff'd* 192 N. Y. 570.

Questions not open to review on confirmation.

The remedy of a property-owner who desires to attack the right of the city to take certain lands for the purpose of a street is to move to vacate or modify the order under which the commissioners act, and the question cannot be raised on motion to confirm the report of the commissioners under this section. Matter of Grand Boulevard and Concourse, 33 App. Div. 210, 53 N. Y. Supp. 331; Matter of Popham Avenue, 55 Misc. 320, 106 N. Y. Supp. 482.

An objection to the qualifications of one of the commissioners cannot be raised for the first time on the application for the confirmation of his report. Matter of City of New York (Avenue A), 66 Misc. 488, 122 N. Y. Supp. 321.

Whether the costs and expenses of the proceeding are extravagant and out of proportion with the size of the proceeding cannot be considered upon motion to confirm the commissioners' report. The time and place to raise such a question was before the judge to whom the costs were presented for taxation. Matter of City of New York (East 214th Street), 68 Misc. 89, 123 N. Y. Supp. 485.

Report only reviewable upon objections presented upon filing of preliminary abstract of report.

Ordinarily only such objections can be passed upon by the court on motion to confirm the report under this section as were duly filed by the objecting property-owner in the manner prescribed by § 981, *ante*. Where, however, it convincingly is shown that the objector through accident or other satisfactory cause was not aware of the proceeding affecting his property, and in good

faith failed to appear therein, and where laches may not be properly imputed against him, the court may refer the report to commissioners for revisal and correction so that an opportunity may be accorded the objector to present evidence in support of his contention of an unjust assessment. Relief will not be granted except upon the strongest evidence, and the court in its discretion may require the objector to submit to an examination by the corporation counsel respecting the facts of his alleged ignorance of the pending proceeding. *Matter of Opening Weiher Court from Washington Avenue, to Third Avenue, Greenbaum, J.*, N. Y. Law Jour., October 8th, 1908.

Minority report.

A minority report from the commissioners cannot properly come before the court, but only one report, that is, of a majority of the commissioners. *In re E. 222d Street*, 122 N. Y. Supp. 320.

Specification of estimates contained in report.

The commissioners of estimate should specify in their report the specific property for which the award is made. *Matter of City of New York*, 118 App. Div. 865, 105 N. Y. Supp. 750.

Where the report of the commissioner of assessment is silent as to the date at which the valuation of the property was taken for the purpose of assessment, *held* that the report should be sent back to the commissioner with instructions that he specify whether the valuation was made as of the date when title vested in the city or as the date of his report. *Matter of City of New York (Thayer Street)*, 138 App. Div. 252, 122 N. Y. Supp. 952.

Scope of review of matters dehors the record.

The knowledge and experience of the individual commissioners as to the value of property taken may be applied to the evidence before them, but they can no more go outside the record in making awards than the court can in reviewing the same. *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 660.

The court at Special Term in reviewing the awards made by the commissioners cannot take into consideration the fact dehors the record before the commissioners, as for example, the detrimental effect of a local power plant which had since been destroyed by fire, but which had been rebuilt so as to be in full operation. *Matter of City of New York (Crotona Park)*, 142 App. Div. 665, 127 N. Y. Supp. 379.

Review of refusal to grant adjournment.

The refusal of the commissioners of estimate to grant an adjournment to the city to enable it to ascertain whether a building erected after institution of proceedings to take the land could be moved back upon the part of the land not taken, *held*, error. *Matter of City of New York (Baychester Avenue)*, 120 App. Div. 393, 105 N. Y. Supp. 214.

Review of rulings on admission or exclusion of evidence.

The court will not disturb the determination of the commissioners of estimate and assessment for mere errors in the admission or exclusion of evidence, unless the commissioners have proceeded upon a wrong theory to the prejudice of one of the parties. *Matter of City of New York (Crotona Park)*, 142 App. Div. 665, 127 N. Y. Supp. 379; *Matter of City of New York (Croton River Dam)*, 129 App. Div. 711, 114 N. Y. Supp. 68; *Matter of City of New York (Croton River Dam)*, 129 App. 707, 114 N. Y. Supp. 75; *Matter of Simmons (Ashokan Reservoir, sec. No. 2)*, 138 App. Div. 667, 122 N. Y. Supp. 874.

While the report of commissioners of estimate will not be set aside because of technical error in the admission of evidence yet where numerous errors have been committed by the commissioners in the admission of evidence and there is a wide discrepancy between the estimate and the facts, the report will not be permitted to stand. *Matter of the City of New York*, 118 App. Div. 272, 103 N. Y. Supp. 441.

Where the admission of incompetent evidence indicates that the commissioners were guided by an erroneous principle the award will be set aside although there was other competent evidence before the commissioners sufficient to sustain the award. *In re City of New York*, 56 Misc. 311, 106 N. Y. Supp. 1003, *aff'd* 125 App. Div. 923.

Where the commissioners, having reserved a motion to strike out evidence establishing the cost of reproducing buildings, and having made their awards, thereafter all certify that before so doing, they granted the motion to strike out and disregarded the testimony, the evidence must be regarded as having been eliminated, before the awards were made. *Matter of City of New York (Croton River Dam)*, 129 App. Div. 707, 114 N. Y. Supp. 75.

Review of values.

Under the provisions of the statute requiring the commissioners to report their proceedings to the court with the minutes of the testimony taken by them, the commissioners cannot base their estimate of damage wholly upon the view of the premises but must consider the evidence of the witnesses. Indeed, the view of the premises is merely for the purpose of enabling them to better understand the evidence. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321; *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 660.

While the fact that the commissioners are required to view premises claimed to have been damaged, and to act to some extent upon their own judgment, does not deprive the court of the power to review their award upon the question of damages, yet, as they may and must base their award upon knowledge derived from that view as well as the evidence of witnesses, unless it appears that they adopted some erroneous rule of damages, or the evidence and their findings show that they have misconceived the facts, and erred in

their estimate, their award will not be interfered with. *Matter of City of New York (Titus Street)*, 139 App. Div. 238, 123 N. Y. Supp. 1018; *Matter of City of New York (Thayer Street)*, 138 App. Div. 252, 122 N. Y. Supp. 952; *Matter of City of New York (Croton River Dam)*, 129 App. Div. 707, 114 N. Y. Supp. 75; *In re Starr Street in Borough of Queens*, 131 N. Y. Supp. 71.

The court will not interfere with the award of the commissioners on the ground that the same is inadequate or excessive unless the amount awarded is so great or so small as to be palpably unjust and indicate that the commissioners proceeded upon an erroneous theory. *Matter of Simmons (Ashokan Reservoir, sec. No. 2)*, 138 App. Div. 667, 122 N. Y. Supp. 874; *Matter of City of New York (Croton River Dam)*, 129 App. Div. 707, 114 N. Y. Supp. 75; *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321; *In re Starr Street in Borough of Queens*, 131 N. Y. Supp. 71.

An award in excess of what the owner claims or for less than the lowest estimate made by the city's experts will be set aside, unless facts and circumstances are adduced which will afford some basis for a different valuation. *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 660; *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

The mere fact that an award is below the lowest estimate made by the claimants' witnesses, affords no ground for the confirmation of an excessive award, where it appears that the claimants' experts in making their estimates of value overlooked the basic principle that the price paid or to be paid for lands, furnished some evidence of value in the absence of proof that the property was sacrificed at the sale. *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 660.

The report of the commissioners will not be set aside merely because the value placed by them upon the land is less than that given by the uncontradicted testimony of the expert called by the property-owners, where two of the commissioners had special knowledge as to the values of the property and made the numerous views thereof, and the property was located in a newly opened district, and therefore honest differences of opinion might naturally be expected as to the rapidity with which development would follow, and opinions as to the future of the character of the developments would be more or less speculative. *Sp. T., Greenbaum, J., Matter of Opening 174th, 175th, and 176th Streets, Aqueduct and Undercliff Avenues*, N. Y. Law Jour., December 9th, 1910.

Confirmation of the report of the commissioners should not be denied simply because some time has elapsed between the date of the report and the taking of formal evidence. It would be a most dangerous rule to establish and one calculated to cause inextricable confusion, and uncertainty in such proceedings, if no attention were to be paid to the certificate of the commissioners, under their oath of office, that the value found by them was as

of the date of their report. *Matter of City of New York (Crotona Park)*, 142 App. Div. 665, 127 N. Y. Supp. 379.

Referring proceedings to new commissioners.

Where confirmation of report is refused upon the ground that the award is too large, new commissioners should always be appointed. If the refusal to confirm the report is affirmed by the Appellate Division, the order should be modified by appointing new commissioners instead of sending the report back to the original commissioners. *Matter of Collis*, 144 App. Div. 382; 129 N. Y. Supp. 214. *In re E. 122d Street*, 122 N. Y. Supp. 320.

Returning report to old commissioners.

Where the Court of Special Term refuses to confirm the report of the commissioners, the same should not be sent to new commissioners but should be returned to the old commissioners for revision and correction. *Matter of Commissioner of Public Works*, 135 App. Div. 561, 120 N. Y. Supp. 930; *Matter of City of New York* (for the acquisition of certain lands between 15th and 18th Streets, etc.), *Bischoff, J., Sp. T., N. Y. Law Jour.*, December 19th, 1907.

Where the court refuses to confirm the report of commissioners and refers the proceeding to new commissioners who are directed to reconsider the previous report and return it corrected and revised or to make a new report, *held* that it was error on the part of the new commissioners to rule out testimony taken before the old commissioners. *Matter of Amsterdam Avenue*, 53 Misc. 342, 104 N. Y. Supp. 821.

Where the proceeding was heard once by commissioners and their report was denied confirmation and a new hearing was had before other commissioners, whose report was confirmed, the court on an appeal from the order confirming the report cannot review the former order denying confirmation from which an appeal was not taken until the second order had been made. *Matter of City of New York (Third Avenue)*, 145 App. Div. 244, 130 N. Y. Supp. 80.

Power of court to amend or modify award.

The Appellate Division has no power to change or modify the award made by the commissioners of estimate and assessment. Its power is limited by this section to returning the report and award to the old commissioners or to new commissioners for revision and correction. *Matter of City of New York (Carroll Street)*, 137 App. Div. 39, 121 N. Y. Supp. 435.

The right of a property-owner to interest as part of the compensation for the taking of his property is dependent upon its allowance by the commissioners as part of the award under § 990, *post*. The court has no power to allow interest where it has not been awarded by the commissioners, and hence cannot in a collateral motion purporting to be made under § 1001, *post*, allow interest after the commissioners' report has been confirmed even though the

corporation counsel did not oppose the motion. If the property-owner believes himself entitled to interest he should make such claim to the commissioners and if the same be disallowed, should oppose the confirmation of the report. If the property-owner has omitted to call the attention of the commissioners to his claim for interest, his only remedy is by appeal or by motion to set aside the report and have the matter remitted for correction. *Matter of Opening Belmont Street*, 128 App. Div. 636, 112 N. Y. Supp. 858.

Where the commissioners have erroneously made a substantial award to abutting owners for taking the fee of a street in a case where they were only entitled to nominal damages and the assessment extends beyond the abutting property, the relief should be sought in the first instance, at least, by an application in the condemnation proceedings to set aside the award and for the reduction of the assessments. *Matter of Schneider*, 199 N. Y. 581, rev'g 136 App. Div. 444, 121 N. Y. Supp. 9.

The court has power to amend an order confirming the report for the purpose of correcting a clerical error therein, and, unlike an application to vacate or reduce assessments, speedy objection is not required, but the error should be corrected unless the applicant's laches has prejudiced the city. *Matter of Imperial Bldg. Co.*, 68 Misc. 513, 125 N. Y. Supp. 115; *In re Opening of Vandervoort Ave.*, 68 Misc. 510, 125 N. Y. Supp. 113.

§ 988. Appeals. (See 3d Ed., p. 695.)

A party who has not appealed from the order confirming the report is bound thereby, and has no standing to move to vacate an order extending the time in which the appellant may print and file appeal papers. *Matter of City of New York (Foster Avenue.)*, 119 App. Div. 491, 104 N. Y. Supp. 71.

An appeal does not lie to the Appellate Division under this section from an order of the Special Term refusing to confirm the report of commissioners, and sending the same back with directions requiring a further report in accordance therewith. The Appellate Division has jurisdiction under this section only to entertain appeal from orders confirming the report. *Matter of Comm. of Public Works*, 185 N. Y. 391, aff'g 111 App. Div. 285, 97 N. Y. Supp. 505.

The provisions of L. 1906, ch. 658, which amended this section by allowing an appeal from an order of the Special Term denying confirmation of the commissioners' report, held to be retroactive and to apply to proceedings pending at the time of its enactment. Where, however, an order denying confirmation had been made and entered and the time fixed by law for appeals had expired before the passage of the amendment, the statute was not applicable and the order was not appealable. *Matter of Commissioner of Public Works*, 135 App. Div. 561, 120 N. Y. Supp. 930, aff'd 199 N. Y. 531.

§ 989. Appeal to Court of Appeals authorized. (See 3d Ed., p. 696.)

Where the confirmation of the report of the commissioners has been unanimously affirmed by the Appellate Division, the Court of Appeals has no jurisdiction to examine or pass upon the question whether the damages awarded by them is sustained by the evidence. *Matter of City of New York (In re Avenue D, Brooklyn)*, 200 N. Y. 536.

§ 990. Vesting of title of land taken for streets or parks or other purposes. (See 3d Ed., p. 697.)

Vesting of title in the city.

The provision of this section that where there are buildings upon the land, title shall not vest in the city until a date not less than six months from the date of filing the oath of the commissioners, becomes applicable only when the buildings had been lawfully erected upon such lands. Accordingly, where buildings had been erected without the approval of the plans by the superintendent of buildings and a proceeding is later instituted to condemn the land, *held*, that mandamus would not lie to compel the superintendent of buildings to approve such plans so as to defeat the vesting of title in the city upon the filing of the oaths of the commissioners. *Matter of Coady*, 146 App. Div. 585.

In order to vest title to a proposed street in the city, all that is necessary is (a) pendency of a valid proceeding for the acquisition of the lands for a public use; (b) the determination of the board that the vesting of title was for the public interest; (c) the passage of a proper resolution fixing the day for such vesting. When these requirements exist, and title vests, it is immaterial what the board may thereafter intend to do with the lands so acquired as long as the use is a public one. *Matter of City of New York (Boston Road)*, 142 App. Div. 726, 127 N. Y. Supp. 637.

The adoption by the board of estimate and apportionment of a resolution that on a day specified, title to the property is to vest in the city, does not preclude the board from adopting another resolution postponing the vesting of title in the city until a future day. *Simpson v. Berkowitz*, 59 Misc. 160, 110 N. Y. Supp. 485.

See cases cited under § 1000, *post*.

Interest on award.

The right to compensation vests in the owners as a personal right at the moment of the taking of the property and interest begins to run from that date upon any award which may be made thereafter. *Matter of Mayor (Morris Avenue)*, 118 App. Div. 117, 103 N. Y. Supp. 180.

Where the city appropriates title to land required for streets or parks, prior to the conclusion of the proceedings, the commissioners are required to

allow as part of the compensation to the landowners interest from the time of vesting title to the date of their report. Section 1001, *post*, provides for the payment of the damages awarded by the commissioners with interest from the date of their report. Matter of Mott Haven Canal Docks, 196 N. Y. 175.

Where an award was sent back to the commissioners for correction and a supplemental report was made making the award to unknown owners, *held*, that interest on the value of the land should be calculated to the date of the second report, and such interest, together with the value of the land, shall become a new principal on which the landowner should be awarded interest until the payment of his claim by the city. Matter of Mott Haven Canal Docks, 196 N. Y. 175.

The right of a property-owner to interest as part of the compensation for the taking of his property is dependent upon its allowance by the commissioners as part of the award under this section. The court has no power to allow interest where it has not been awarded by the commissioners and hence cannot in a collateral motion purporting to be made under § 1001, *post*, allow interest after the commissioners' report has been confirmed, even though the corporation counsel did not oppose the motion. If the property-owner believes himself entitled to interest he should make such claim to the commissioners and if the same be disallowed, should oppose the confirmation of the report. If the property-owner has omitted to call the attention of the commissioners to his claim for interest, his only remedy is by appeal or by motion to set aside the report and have the matter remitted for correction. Matter of Opening Belmont Street, 128 App. Div. 636, 112 N. Y. Supp. 858.

Closing streets.

The power vested in the city under § 442, *ante*, to close streets without compensating owners whose direct access to their property has been thereby cut off, is not affected or impaired by the provision of this section which declares that the title to lands acquired by the city shall be held in trust, that the same be appropriated or kept open for a public street forever. The legislature has the power to free the city of this trust by legislation authorizing the closing of streets. *Reis v. City of New York*, 113 App. Div. 464, 99 N. Y. Supp. 291, *aff'd* 188 N. Y. 58.

Owners of land required for streets may convey to the city.

(See 3d Ed., p. 700.)

§ 992. Any owner or owners of land and of all the estate therein embraced within the lines of any street laid down and shown on the map or plan of The City of New York, and extending from a side of said street to or beyond its center line, may, without compensation and before the appointment of the commissioners, convey all their right, title and interest therein, providing the same shall be free from

incumbrances inconsistent with the title to be acquired by the city, to the city of New York, and upon the delivery of such conveyances to the corporation counsel of said city with affidavits made by all such owners to the effect that the persons making them, are the owners of the estates in such lands so conveyed by them, respectively, and stating their interests, and that such estates in such lands are free of all *incumbrances, except as aforesaid, it shall be the duty of such corporation counsel to examine such conveyances and papers, and if such title shall not be rejected for good cause, by such corporation counsel, he shall cause the said conveyances to be recorded in the office in which conveyances of real estate are recorded in the county in which such lands are located within sixty days after their delivery to him, and file them with the comptroller of such city, and thereupon the city of New York shall become vested with the title to said lands to the same effect and extent as if they had been acquired by a proceeding taken for the opening of that portion of said street; after the making and acceptance of such conveyances, no proceedings to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the streets so conveyed, and extending to the center of the block on either side of such portion of said street so conveyed, be chargeable with any portion of the expense of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid. (*As amended by L. 1910, ch. 548.*)

§ 995. City entitled to compensation and liable to assessment.
(See 3d Ed., p. 705.)

The city is entitled to compensation when land acquired for general corporate purposes is taken for a street. So *held*, holding that the city should be awarded compensation where lands acquired by the city for its water pipe lines, was taken for a street. The fact that the pipe line system is not disturbed thereby, does not affect the right of the city to compensation since the laying out of a street deprived the city of the right in the future of using the surface of the land for corporate purposes, e. g., a public building, *Matter of Mayor of N. Y. (In re Van Cortlandt Avenue)*, 186 N. Y. 237, *aff'g* 114 App. Div. 904, 100 N. Y. Supp. 1147.

§ 998. Costs and charges. (See 3d Ed., p. 708.)

The commissioners should not be allowed compensation for meetings at which nothing was done but to note defaults or grant adjournments. *Matter of City of New York (Olivet Avenue)*, 70 Misc. 276, 127 N. Y. Supp. 218.

* So in original.

Compensation of commissioners of estimate and assessment cut down where the proceeding was unduly prolonged and an unnecessary number of hearings held. *In re* Riverside Drive and Parkway, 128 App. Div. 921, 112 N. Y. Supp. 869.

The commissioners are not entitled to compensation for taking proof of title, where the same was undisputed. The provisions of § 978, *ante*, require that in such cases the matter should be referred to the clerk of the commissioners, or to the assistant corporation counsel. Matter of City of New York (Olivet Avenue), 70 Misc. 276, 127 N. Y. Supp. 218.

The amendment of this section by L. 1906, ch. 658, limiting the charges of commissioner of estimate and assessment to ten dollars a day, has no application to proceedings pending at the time of its passage. So held, holding that commissioners of estimate and assessment in a proceeding in which steps had been taken prior to the passage of the amendment, were entitled to the extra allowance given by the statute before the amendment in proceedings of a difficult nature. Matter of City of New York (27th and 28th Streets.), 52 Misc. 602, 102 N. Y. Supp. 837; *In re* City of N. Y. (West 20th Street), Dowling J., Sp. T., N. Y. Law Jour., November 16, 1906; Matter of Willis Ave. Bridge, Sp. T., Cohalan, J., N. Y. Law Jour., July 12, 1911.

The compensation given to the commissioner by this section is not wages, salary or earnings, within the meaning of Code Civ. Pro., § 1391. *Jones v. Nicoll*, 72 Misc. 483, 131 N. Y. Supp. 341.

§ 1000. Discontinuance of proceedings. (See 3d Ed., p. 710.)

This section authorizes a discontinuance of the proceeding as to a portion of the property affected as well as a discontinuance of the proceeding *in toto*. Matter of Mayor (Mt. Vernon Avenue), 52 Misc. 319, 102 N. Y. Supp. 159, *aff'd* 127 App. Div. 650, 111 N. Y. Supp. 895. See *People ex rel. Wynne v. Morris*, 143 App. Div. 293, 128 N. Y. Supp. 74.

The adoption of a resolution by the board of estimate under § 990, *ante*, vesting title to lands proposed to be taken in the city, does not prevent the discontinuance of the proceedings to take such lands before the confirmation of the report. Matter of Mayor (Mt. Vernon Avenue), 127 App. Div. 650, 111 N. Y. Supp. 895, *aff'd* 193 N. Y. 658. Compare *Reis v. City of New York*, 188 N. Y. 58, *aff'g* 113 App. Div. 464, 99 N. Y. Supp. 291; *Simpson v. Berkowitz*, 59 Misc. 160, 110 N. Y. Supp. 485.

§ 1001. Damages for land taken; when to be paid. (See 3d Ed., p. 711.)

Set-offs against award.

The city cannot deduct from an award, the amount of a wholly void assessment against the property for the local improvement. A different rule pre-

vails when the assessment is not wholly void. In such a case, the property owner is confined to the remedy prescribed by §§ 958, 959 and 962, and he cannot obtain a reduction of the amount of the assessment in proceedings to collect the award under § 1001, *post*. *Matter of City of New York (In re wharfage rights appurtenant to old pier No. 11)*, 114 App. Div. 519, 100 N. Y. Supp. 140.

Where the title to property is acquired by the city in condemnation proceedings at a date when the taxes for the year have not become a lien thereon, the city cannot set off such taxes against the sum awarded the owner as compensation for the taking of the property. *Matter of the Mayor (Morris Avenue)*, 118 App. Div. 117, 103 N. Y. Supp. 180.

Where taxes have been improperly deducted by the city from an award, the person entitled to the award will not be remitted to a proceeding against the comptroller to recover such moneys but the question may be disposed of in the condemnation proceedings. *Matter of the Mayor (Morris Avenue)*, 118 App. Div. 117, 103 N. Y. Supp. 180.

A contract between one whose property has been taken in condemnation proceedings and a corporation, whereby the latter was authorized to proceed in the matter of the owner's claim for damages for which it was to be paid a proportion of the award, does not entitle the corporation to a lien on the award. *Matter of City of New York (Avenue A, etc.)*, 146 App. Div. 125.

Interest on award.

The demand for payment must be in writing, a mere verbal demand is insufficient to bind the city for interest for more than six months. *Matter of City of New York (Delancey Street)*, 136 App. Div. 546, 121 N. Y. Supp. 202, *aff'd* 199 N. Y. 531.

Demand for payment need not be made upon the comptroller personally, but may be made upon any person designated by him to take charge of the room or department where such demands are to be made. *Matter of City of New York (Delancey Street)*, 136 App. Div. 546, 121 N. Y. Supp. 202, *aff'd* 199 N. Y. 531.

A demand by a property owner for the amount of an award together with lawful interest thereon, less any and all taxes, and assessments or other incumbrances, now a legal lien on said award is insufficient to continue interest on the award after the expiration of six months from the confirmation of the commissioner's report. The demand should have set forth specifically and not in general terms, the amount of the taxes and other incumbrances referred to thereon. *Matter of Bankers' Investment Co.*, 141 App. Div. 591, 126 N. Y. Supp. 241. Compare *Matter of Callender Realty Co. (Thayer and Alden Streets)*, Sp. T., Bijur, J., N. Y. Law Jour., April 27th, 1911, where it was held that the same notice was sufficient in view of the evidence adduced, showing that the same had been customarily recognized by the comptroller

as sufficient and distinguishing Matter of Bankers' Investment Co. (*supra*), because in that case no evidence of the custom had been presented. See also Matter of Unnamed Street, Bijur, J., N. Y. Law Jour., November 4th, 1911, when the same form of demand was held sufficient.

Where a property owner made a demand for the amount of damages awarded to him, without referring to the assessment for benefits levied upon the property, *held* that he was not entitled to more than six months' interest on the demand. Matter of Bankers' Investment Co., 141 App. Div. 591, 126 N. Y. Supp. 241.

The owner of property incumbered by a mortgage is not bound to tender a satisfaction or release of the mortgage in order to bind the city to pay interest for more than six months under the provisions of this section. Such a tender can only be required at the time of the actual payment of the award. Matter of City of New York (Delancey Street), 136 App. Div. 546, 121 N. Y. Supp. 202, *aff'd* 199 N. Y. 531.

A written offer by the city to pay an award will not stop the running of interest thereon where the comptroller refuses to pay the same unless the property owner complies with conditions which the city has no lawful right to impose. Matter of Callender Realty Co. (Thayer and Arden Streets), Sp. T., Bijur, J., N. Y. Law Jour., April 27th, 1911.

An agreement between the city and a landowner upon payment of the principal of an award that "all claims for interest upon the award should be reserved to be determined in a subsequent action to be brought therefor" is valid and binding upon the city, and the acceptance of such award without interest in reliance upon such an agreement cannot be regarded as a waiver of the interest on the award. *Grote v. City of New York*, 190 N. Y. 235, *rev'g* 117 App. Div. 768, 102 N. Y. Supp. 977.

Where the property owner accepted a certain sum "in full payment and satisfaction of said awards and the interest thereon" in consideration of the city waiving its claim to rents collected subsequent to the date that title vested in the city, *held*, that the settlement constituted an accord and satisfaction, and that the property owner is not entitled to recover further interest from the date of the demand to the date of actual payment. Matter of Seybel, 120 App. Div. 291, 105 N. Y. Supp. 145, *aff'd* 194 N. Y. 589.

Proceedings to compel payment of award.

It seems that the person in whose favor an award has been made, is limited to the proceedings prescribed in this section, and cannot bring an action to recover the award. Matter of City of New York (*In re* wharfage rights appurtenant to Pier old No. 18), 114 App. Div. 519, 100 N. Y. Supp. 140.

Mandamus will lie to compel the payment of an award to which the claimant is clearly entitled. The city, having unlawfully refused to pay the award,

cannot contest the claimant's right to proceed by mandamus rather than by motion merely because he will obtain greater costs thereby. *In re Macholdt*, 144 App. Div. 252, 128 N. Y. Supp. 1069.

Where part of an award is withheld by the comptroller without authority of law, the person entitled thereto will not be remitted to an action against the comptroller to recover the same but the matter may be disposed of in the proceeding to determine the rights of claimants to the award. *Matter of City of New York*, 118 App. Div. 117, 103 N. Y. Supp. 180.

A claimant to a portion of an award made to unknown owners is not required to affirmatively prove title as a condition precedent to the right to intervene in a proceeding instituted to ascertain the persons to whom the award should be paid. It is sufficient that he merely claims to be interested in the lands for which the award has been made or any part thereof; and thereupon the court has the right either to take proof or to refer the matter to a referee for such purpose. *Matter of City of New York (Public Park)*, 136 App. Div. 654, 121 N. Y. Supp. 124.

The right of a property owner to interest as part of the compensation for the taking of his property is dependent upon its allowance by the commissioners as part of the award under § 990, *ante*. The court has no power to allow interest where it has not been awarded by the commissioners, and hence cannot in a collateral motion purporting to be made under this section, allow interest after the commissioners' report has been confirmed, even though the corporation counsel did not oppose the motion. If the property owner believes himself entitled to interest he should make such claim to the commissioners, and if the same be disallowed, should oppose the confirmation of the report. If the property owner has omitted to call the attention of the commissioners to his claim for interest, his only remedy is by appeal or by motion to set aside the report and have the matter remitted for correction. *Matter of Opening Belmont Street*, 128 App. Div. 636, 112 N. Y. Supp. 858.

The payment of damages caused by the closing of a street is governed by L. 1895, ch. 1006, § 11, and the provisions of this section have no application thereto, even though the street closing proceedings were carried on in conjunction with one for the opening of a street. *Matter of Edelmuth v. Prendergast*, 142 App. Div. 785, 127 N. Y. Supp. 445, *rev'd on other grounds* 202 N. Y. 602.

In the absence of objection by the city, which is alone entitled to be heard in opposition, the court may grant an order directing the comptroller to pay over the award, and the alleged lienor cannot raise the question that the power of the court ceased when it confirmed the award of the commissioners of assessment. *Matter of City of New York (Avenue A, etc.)*, 146 App. Div. 125.

§ 1004. Sums assessed to be liens. (See 3d Ed., p. 715.)

Inasmuch as no valid assessment for benefit can be made against a cemetery association, such an assessment cannot be sustained under the provisions of this section which makes an assessment a personal liability as well as a lien upon the land. A valid assessment is as necessary a condition precedent to personal liability as it is to the creation of a lien. *Matter of City of New York (Jerome Avenue)*, 192 N. Y. 459, mod'g 120 App. Div. 201, 105 N. Y. Supp. 315.

§ 1007. Interest limited to excess in certain cases. (See 3d Ed., p. 718.)

This section contemplates that the party in whose favor an award was made should have the benefit of the application of his award in extinguishment or reduction of the assessment as of the date the assessment was levied, or would otherwise have drawn interest, so that he would in the one case be liable only for interest on the surplus of the assessment over the award, and would receive, in the other case, the surplus of the award over the assessment and interest from the time the award draws interest. The primary purpose of the statute was not to equalize the interest on assessments and awards, but rather to relieve the party assessed to whom an award was made of the necessity of using other funds to pay the assessment to the extent that the award would pay the same. The city could always protect itself against having to pay interest on an award, and, being deprived of the right to collect interest on an assessment by paying the award or tendering payment thereof, which would stop the running of interest thereon. Accordingly where part of a parcel of land was taken for the purpose of a street and the rest of the parcel remaining in the owner was assessed for benefits, *held*, that the city in paying the excess of the award over the assessment could not credit itself with seven per cent interest on the amount of the assessment unpaid sixty days after the confirmation of the report and allow the landowner six per cent interest on the award. *Matter of Bankers' Investment Co.*, 141 App. Div. 591, 126 N. Y. Supp. 241. To the same effect see *Matter of Unnamed Street, Bijur, J.*, N. Y. Law Jour., November 4th, 1911.

Where it appeared that certain assessments for benefits erroneously stated to be against lands of others, were in fact against lands of the petitioner to whom an award was made, the court will require the official who is authorized to collect the assessment to give the real owner the benefit of the statutory provisions with regard to interest in precisely the same manner as if the name of the owner had been correctly given in the assessment for benefits. *Matter of Bankers' Investment Co.*, 141 App. Div. 591, 126 N. Y. Supp. 241.

Discontinuing and closing streets, avenues, etc., in The City of New York. (See 3d Ed., p. 719.)

NOTE.—The provisions of the New York City Consolidation Act, L. 1892,

ch. 410, §§ 1009 to 1021, relative to the closing of streets, have been superseded by ch. 1006 of the Laws of 1895, passed June 12, 1895, which provides a new and complete system for the discontinuance and closing of streets in The City of New York. The act of 1895, though in form a general one, applying to all cities having a population of more than a million and a quarter inhabitants, in effect applies exclusively to The City of New York. In substance, it forms a part of the charter of The City of New York, and was incorporated in full in Ash's Greater New York Charter, Third Edition, with the authorities construing its provisions. The following annotations bring the decisions upon the statute up to the date of the publication of this supplement.

Effect of statute on public and private easements.

Prior to the passage of this act, the effect of the closing of a street in The City of New York was that public easements in the street were alone extinguished, and that private easements therein of the owners of abutting lands, of light, air and access, still remain. The object of this statute was to enable the city to destroy not only the public easements in the street, but the private easements of the abutting owner of light, air and access. *Gillender v. City of New York*, 127 App. Div. 612, 111 N. Y. Supp. 1051; *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

The laying out of a new street and the discontinuance of the old one does not extinguish the private easements acquired by the abutting owner by grant or otherwise in the old street. These private easements of the abutting owner are in addition to such as he possesses as one of the public, to whose use the property has been subjected. They are independent of the public easement and indestructible, in their nature, by the acts of the public authorities, or of the grantor of the premises, as is the estate, which is the subject of the grant. *Johnson & Co. v. Cox*, 196 N. Y. 110, *aff'g* 124 App. Div. 924, 108 N. Y. Supp. 1136.

What constitutes a closing of a street.

As has been frequently pointed out, "closing" of a street under the act of 1895 has two meanings. So far as the legal discontinuance of the street is concerned, it becomes complete when the prescribed map is filed indicating the proposed change. The physical closing, by which is meant the discontinuance of the use of the former street for street purposes, is, however, postponed until other means of access is provided by the opening of other streets or, if no other mode of access is provided, until the damages to the abutting owners have been ascertained and paid. *Matter of City of New York (West 151st Street)*, 132 App. Div. 867, 117 N. Y. Supp. 841.

The filing of the permanent map or plan does not operate to permanently close the discontinued streets within the new block until at least one street bounding the same becomes physically open for public use. Where a new block is bounded on the map partly by closed streets and partly by a new

street, damages to the property owner do not accrue until the new street has been actually and physically open. Where, however, the new block is bounded by a street which had been actually opened before the filing of the map and was continued as a public street thereby bounding the new block, the property owner is entitled to damages as of the date of the filing of the map. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

A portion of a street which had been opened and was in public use prior to the filing of a map under this section discontinuing the same, does not cease to be a street until the street laid down in the map forming a substitute therefor has been physically opened. *Matter of City of New York*, 120 App. Div. 201, 105 N. Y. Supp. 315, *mod'f'd* 192 N. Y. 459; *Johnson & Co. v. Cox*, 196 N. Y. 110, *aff'g* 124 App. Div. 924, 108 N. Y. Supp. 1136.

Where the city under the authority of Laws 1903, ch. 425, as amended by Laws 1904, ch. 639, granted a certain portion of a street to a railroad company so that the width of the street was narrowed from fifty to thirty-eight feet, *held*, that an owner abutting upon such street was entitled to compensation under this act for the injury occasioned by the partial closing of the street, notwithstanding that the fee of the street was in the city and held by it in trust for street purposes. *People ex rel. Winthrop v. Delaney*, 120 App. Div. 801, 105 N. Y. Supp. 746.

Where the outlet of a street which was formerly a *cul de sac* became legally closed, abutting owners whose outlet was thus cut off, are entitled to compensation. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

Although a street becomes legally closed upon the adoption of resolutions by the board of estimate and apportionment, private easements are not destroyed thereby, as there is no provision for compensation during the period covered by the proceedings before the confirmation of the report, *so held*, denying a motion to vacate a preliminary injunction restraining the city from physically closing a street and thereby cutting off access prior to the confirmation of the report. *Gillender v. City of New York*, 127 App. Div. 612, 111 N. Y. Supp. 1051.

See also cases cited under § 442, *ante*.

Filing of claim.

The presentation of a claim for damages to the comptroller of the city within six years after the filing of the map discontinuing the street as provided for by § 5 of the Street Closing Act, is a condition precedent to any right to compensation and a petition which fails to allege the service of such claim is fatally defective. *Matter of Richard Street*, 138 App. Div. 821, 123 N. Y. Supp. 438.

The failure of a property owner to file a claim for compensation with the comptroller within six years after the filing of the general plan or map closing

the street bars his right to compensation, and a claim filed within the statutory periods by his grantee will not inure to his benefit so as to prevent the bar of the statute. *Matter of Mayor, etc., of New York (Grote Street)*, 139 App. Div. 69, 123 N. Y. Supp. 619.

The provision of § 5 of the Street Closing Act, depriving an abutting owner of his right to compensation for the closing of a street unless he files his claim for the same with the comptroller within six years after the filing of the permanent map or plan, is applicable only to claims for damages for the closing of streets which had never been actually opened and used by the public. The provision has no application to claims by owners abutting on existing streets in actual use when the general map is filed, for in such case the statute postpones the physical closing of the street until another street bounding the lot or square has been opened, and this may be deferred for an indefinite time after the map is filed. *Matter of City of New York (Walton Avenue)*, 145 App. Div. 855, 130 N. Y. Supp. 378, *Id.* 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

Compelling corporation counsel to begin proceedings.

Where an owner, abutting upon a street, a portion of which was closed by the city, presented to the comptroller in conformity with § 5 of the Street Closing Act, a written claim for compensation and a request that a proceeding be instituted by the appointment of commissioners to ascertain his damage which request was refused, *held*, that mandamus would lie to compel the corporation counsel to institute proceedings to ascertain such damage; also *held* that the fact that the damage occasioned by the partial closing of the street was small furnishes no defense to the application for the writ. *People ex rel. Winthrop v. Delaney*, 120 App. Div. 801, 105 N. Y. Supp. 746, *mod'f'd* 192 N. Y. 533.

Jurisdiction of commissioners dependent on order.

Commissioners have no jurisdiction to make an award to claimants who have not obtained an order under § 14 of the Street Closing Act, nor can an award be made in favor of one not named in such order. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

Amendment of proceedings.

The provisions of § 15 of the Street Closing Act, giving to the court power to amend any defect or informality of the proceeding authorized by the act refers only to irregularities and omissions in proceedings properly instituted; it has no application where there has been a failure to present a claim within the time limited. *Matter of Richard Street*, 138 App. Div. 821, 123 N. Y. Supp. 438.

Although the court under § 15 of the Street Closing Act has power to amend defects and irregularities in proceedings to discontinue streets, it will not, after a certain street has been discontinued by resolution adopted and map

filed under said act and after the city has been enjoined from cutting off access to the lands of an adjoining owner unless the right be taken by eminent domain and due compensation made, amend the proceeding so as to reopen a disconnected portion of the street, where the effect of such action will give the adjoining owner no access to other parts of the city and may deprive her of the right to damages. *Matter of City of New York (West 151st Street)*, 132 App. Div. 867, 117 N. Y. Supp. 841.

Principles to be employed in estimating damage.

One claiming damages for the closing of a street is under the burden of showing both his title and his damage. If he fail to do so, an award will be vacated. *Matter of Mayor, etc., of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

The property owner is entitled to compensation for the depreciation of the value of his lands by the legal closing of the street or avenues and the termination of every right he had of having them maintained as public avenues or streets or to use the same for ingress or egress to his property. *Matter of Mayor, etc., of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

There can be no award for damages for closing a street which had never, though laid out as an intended street on a park department map, been dedicated by the owner by map filed by him in any public office, and no acceptance shown either by map filed by the authorities after dedication by the owner or by public use as a street. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

The commissioners in awarding compensation to the property owner occasioned by the closing of a street are not limited by the amount stated in the claim filed pursuant to § 5 of the Street Closing Act but may make an award in excess thereof. The object of filing of claim under this section was not to procure a settlement thereof but to have proceedings instituted to ascertain the damages sustained by the claimant. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, *aff'd* 197 N. Y. 518.

The commissioners in awarding damages for the closing of a street, did not err in refusing to consider whether, in another proceeding to acquire some of the property affected, the claimants had testified to the value of their property on the assumption that its value continued to be enhanced by easements of access afforded by streets then physically open (although they had been closed by filing the map); estoppel is made by the record and not by mere testimony in a former proceeding, and it would not be assumed that the former commissioners gave an award for easements then not existing, but if so, the city's remedy was to correct the record of the former proceeding. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App.

Div. 696, 116 N. Y. Supp. 471, aff'd 197 N. Y. 518. Compare *Matter of Pinehurst Avenue*, 67 Misc. 510, 123 N. Y. Supp. 344.

The just compensation to which each owner is entitled is the depreciation in value of his parcel of land by the legal closing of the avenue or street, and the right thereto accrued at once, without regard to the question as to whether the streets were thereupon actually closed, as they might have been, or whether the property owners were permitted to continue to use them, and regardless of whether or not the owner continued to hold the title to the parcel which was damaged by the closing of the avenue or street, or whether or not he thereafter parted with title voluntarily or title was taken from him *in invitum*, for those considerations could not affect the *quantum* of damages or the right thereto, which does not run with the land. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, aff'd 197 N. Y. 518.

The effect of filing the permanent map or plan under § 2 of the Street Closing Act was to permanently close the discontinued streets within the new block laid down on the map, and the property owners are entitled to damages as of the date of the filing of the map and are not required to wait until one of the streets bounding the new block has been actually opened as a public street. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, aff'd 197 N. Y. 518.

Effect of confirmation of report.

It is too late after a report has finally been confirmed without opposition, for a claimant to insist that his award is insufficient either because interest was not included in the award or for any other reason. *Matter of Minzesheimer*, 144 App. Div. 576, 129 N. Y. Supp. 779.

Payment of award.

The payment of damages caused by the closing of a street is governed by § 11 of the Street Closing Act, and the provisions of § 1001 of the Charter have no application thereto, even though the street closing proceedings were carried on in conjunction with one for the opening of a street. *Matter of Edelmuth v. Prendergast*, 142 App. Div. 785, 127 N. Y. Supp. 445, rev'd on other grounds, 202 N. Y. 602.

Interest.

It is the duty of the commissioners in estimating the compensation to be awarded for the closing of a street to ascertain the loss to the abutters as of the date when the street was legally closed, adding thereto interest to the date of their report; and such loss and interest taken together constitute the damage and may be included in one sum as damage without designating how much is allowed for loss and how much for interest. Accordingly, when the commissioners state that their awards represent the entire loss and damage which any person named therein has suffered in consequence of the closing of the street it will be presumed, in the absence of proof to the contrary, that

the awards include both the loss at the date the street was legally closed, and interest thereon to the date of the report. *Matter of Minzesheimer*, 144 App. Div. 576, 129 N. Y. Supp. 779.

A property owner damaged by the closing of a street is also entitled to interest on the award made to him, beginning at a date thirty days from the time he makes proper demand for payment upon the comptroller. *Matter of Minzesheimer*, 144 App. Div. 576, 129 N. Y. Supp. 779; *Matter of Edelmuth v. Prendergast*, 142 App. Div. 785, 127 N. Y. Supp. 445, rev'd on other grounds, 202 N. Y. 602.

The pendency of an appeal by the city from an order confirming an award in a street closing proceeding does not stay the property owner from making a demand for the purpose of fixing the date from which interest will accrue. Accordingly, it is no excuse for the failure to make such a demand that the city had appealed from the order confirming the award. *Matter of Edelmuth v. Prendergast*, 142 App. Div. 785, 127 N. Y. Supp. 445, rev'd on other grounds, 202 N. Y. 602.

The interest which is required to be included in an award is given by way of compensation. The interest upon the award, which is to begin on a day thirty days after demand, is not a part of the compensation, but is given as a penalty for delay in payment. *Matter of Minzesheimer*, 144 App. Div. 576, 129 N. Y. Supp. 779.

Inasmuch as the city cannot close a street physically open and thereby deprive the property owner of access to his property without compensation, the property owner is not entitled to interest on the sum awarded until after the confirmation of report. *Gillender v. City of New York*, 127 App. Div. 612, 111 N. Y. Supp. 1051.

Transfer of property pending proceedings.

The right to damages is a personal claim; it does not run with the land. *Matter of Richard Street*, 138 App. Div. 821, 123 N. Y. Supp. 438.

It seems, that one to whom the property was conveyed after the closing of the street cannot recover compensation therefor. *Matter of Mayor, etc., of New York (Grote Street)*, 139 App. Div. 69, 123 N. Y. Supp. 619.

Right to inclose bed of discontinued street.

The owner of the fee of a portion of a street which was opened and in public use at the time of the filing of the map discontinuing the same, is not entitled to inclose and occupy it until such time as a new street shall be open to take its place. The term "opened" as used in the statute, is not employed in its technical sense, i. e., when the city takes title to the fee of the roadbed, but is employed in its popular sense as meaning actually opened so that it can be used for travel. *Johnson & Co. v. Cox*, 196 N. Y. 110; to same effect see *Matter of City of New York*, 192 N. Y. 459, mod'g 120 App. Div. 201, 105 N. Y. Supp. 315.

A property owner does not lose his right to compensation by reason of his failure to inclose the portion of the discontinued street in front of his premises as authorized by the statute. Nor does the fact that he continued to use the street after it had been legally closed affect his right to compensation, since such use was by sufferance only and not as matter of right. *Matter of Mayor, etc., of City of New York (Walton Avenue)*, 131 App. Div. 696, 116 N. Y. Supp. 471, aff'd 197 N. Y. 518.

Conveyance by city of lands embraced within closed streets.

The provisions of § 205 of the charter, as amended by L. 1903, ch. 379, providing for the sale of lands lying within a closed street to the abutting owner, is not inconsistent with and did not operate as a repeal of the provisions of § 17 of the Street Closing Act, but was intended to apply to cases in which the abutting owner had not complied with the provisions of the latter act. *People ex rel. Brown v. Metz*, 119 App. Div. 271, 104 N. Y. Supp. 649.

To entitle an abutting owner to a conveyance from the city of lands embraced within a closed street, there must be a determination by the local authorities that the lands are not required for other public uses and a payment to the city of the amount fixed by the commissioners of estimate and assessment as the value of the lands over and above taxes and assessments, and also the payment of taxes and assessments levied upon the property. In the absence of these requirements, the title of the city becomes absolute, and the property must be disposed of according to the general law relating to the disposal of real property owned by the city. *People ex rel. Brown v. Metz*, 119 App. Div. 271, 104 N. Y. Supp. 649.

When taxes and water rents to be liens on lands assessed.

(See 3d Ed., p. 738.)

§ 1017. All taxes and all assessments for local improvements and all water rents, and the expenses of water meters, with their connections and setting, and water rates and other lawful charges for the supply of water measured by meters, and the interest and charges thereon, which may, in the city of New York, as by this act constituted, hereafter be laid or may have heretofore been laid, upon any real estate now in said city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges. No assessments for any local improvements shall be deemed to be fully confirmed, so as to be due and be a lien upon the property included in the assessment, until ten days after the title thereof, with the date of confirmation, shall be entered with the date of such entry, in a record of the titles of assessments confirmed, to be kept in the office of the collector of assessments and arrears. The words "water rents" whenever they are used in this

title shall include the expenses of meters, with their connections and setting, water rents, water rates and all lawful charges for the supply of water measured by meters. No charge for expenses of meters, their connections or setting shall be due or become a charge or lien on the premises in which the water meter shall be installed or against which a charge shall be made, until such charge shall have been definitely fixed by the proper officer and an entry thereof shall have been made with the date of such entry in the book in which the regular water rent charges against such premises are to be entered. No water rent, for the supply of water measured by a meter, shall be due or become a lien or charge upon the premises in which such meter is installed until an entry shall have been made indicating that said premises are metered, with the date of such entry in the book in which the regular water rent charges against such premises are to be entered. Whenever an increase in the amount of water rent shall be made or a charge shall have been made for water for any building completed subsequent to the first day of May in each year the amount of such increase of the water rent or new charge for such new building shall not be due or become a lien or charge against the premises until the amount thereof shall have been entered with the date of such entry in the book in which the regular water charges against such premises are to be entered. (*As amended by L. 1908, ch. 490, § 6.*)

Water rents do not become a lien until the amount thereof is ascertained and determined and an actual entry made in the proper book. *Mandel v. Weschler*, 128 App. Div. 505, 112 N. Y. Supp. 813, *aff'd* 198 N. Y. 518.

Water rents are not a lien on new buildings, until an application for water has been made and a permit issued under City Ordinances, § 283, providing that all rents for use of water should be paid in advance at the time of applying for water and before permit is issued, to be calculated up to the first day of May, succeeding. *Mandel v. Weschler*, 128 App. Div. 505, 112 N. Y. Supp. 813, *aff'd* 198 N. Y. 518.

Where an owner of real property relying upon the representation of the city authorities and the public records that a lien upon the premises for water consumed by a tenant had been paid, released a third party who was a surety for the payment of water rates by the tenant, *held*, that the city could not thereafter on discovering that the water rates had not in fact been fully paid, assert a lien upon the property for the amount unpaid. *Rankin v. City of New York*, 145 App. Div. 838, 130 N. Y. Supp. 427.

There is nothing in the nature of a lien for taxes or assessments, or in the fact that such lien exists in favor of a sovereign taxing power, to prevent the

application of the equitable doctrine of subrogation, when justice demands it. Accordingly, where the payment of an assessment, although voluntary was brought about by a mistake, induced by a forgery, *held* the right to subrogation would be sustained. *Title Guarantee & Trust Haven*, 196 N. Y. 487, *aff'd* 128 App. Div. 907, 111 N. Y. Supp. 309, 126 App. Div. 802, 111 N. Y. Supp. 305.

Where a tenant used water through a water meter, and fails to pay charges therefor which become a lien on the land, the landlord may pay same in order to discharge the lien and is thereupon subrogated to the right of the city against the tenant liable for the water. *New York University American Book Co.*, 197 N. Y. 294, *aff'd* 132 App. Div. 732, 117 N. Y. 387, which *aff'd* 62 Misc. 122, 115 N. Y. Supp. 103.

§ 1019. Interest to be charged if assessment unpaid for a certain number of days. (See 3d Ed., p. 739.)

See *People ex rel. Fellman v. Metz*, 134 App. Div. 533, 119 N. Y. Supp. 103.

Rate. (See 3d Ed., p. 740.)

§ 1020. Interest shall hereafter be charged and collected at the rate of seven per centum per annum on all arrears of taxes and assessments returned to the collector of assessments and arrears from the time they become due and on water rents and the penalties thereon from the time the taxes become due, to which interest may be added until the date of payment, or until such other date as when the amount thereof may have been advanced to the city by the purchaser of the tax lien in respect thereof. (*As amended by L. 1908, ch. 490, § 7.*)

Apportionment of assessment. (See 3d Ed., p. 740.)

§ 1021. If a sum of money in gross has been or shall be assessed upon local improvements, upon any lands or premises in the city of New York, any person or persons claiming any divided or undivided part thereof may pay such part of the sums of money so assessed, also of interest and charges due or charged thereon, as the comptroller may deem to be just and equitable; and the remainder of the sum of money so assessed, together with the interest and charges, shall be a lien upon the residue of the land and premises only, and the tax lien upon such residue may be sold in pursuance of the provisions of this section to satisfy the residue of such assessment, interest, or charges thereon in the same manner as though the residue of said assessment had been imposed upon such residue of said land or premises. (*As amended by L. 1908, ch. 490, § 8.*)

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Commissioner of water supply, gas and electricity to transmit separate account for each ward; penalty for wasting water. (See 3d Ed., p. 741.)

Commissioner of water supply, gas and electricity
March in each year, cause to be
comptroller a separate account
for each section or ward or lots on which the regular annual water rents for the water year for which charges had last been imposed, including the extra charges to be included in said rents, as provided by this act, shall remain unpaid with the amount due on each lot. Said commissioner shall also prepare and transmit to the comptroller a separate account for each section or ward of all lots against which any charge for water by meter measurement, penalties, expenses and costs of meters, their connection, setting and maintenance, has been made and which became due and payable during the preceding calendar year and which may remain unpaid together with the amount due on each lot. He shall at the same time notify the comptroller of the aggregate amount of such water rents and charges so returned, and shall thereafter receive no payment on account of the same, but may, nevertheless, certify to the comptroller any errors or overcharges, which shall, upon said certificate, be remitted by the comptroller at any time before settlement. The said commissioner of water supply, gas and electricity is hereby authorized to prescribe the penalty, not exceeding the sum of five dollars for each offense, for permitting water to be wasted, and for any violation of such reasonable rules as he may from time to time prescribe for the prevention of the waste of water. Such fines shall be added to the water rents. (*As amended by L. 1911, ch. 455.*)

Receiver of taxes to return arrears to the collector. (See 3d Ed., p. 741.)

§ 1023. The receiver of taxes shall, on the first day of March in each year, make a return to the collector of assessments and arrears, of all taxes on real estate and of water rents, which have been added thereto, remaining unpaid, and shall notify the comptroller of the aggregate amount of arrears so returned, and balance on his books the accounts of the arrears so returned, by charging the amount thereof to the said collector, and shall thereafter receive no payments on accounts of arrears so returned, but may nevertheless certify to the collector of assessments and arrears any errors which shall, upon such certificate, be corrected by the said collector any time before settlement. (*As amended by L. 1911, ch. 673.*)

Water rents to be provided for in assessment-rolls. (See 3d Ed., p. 743.)

§ 1024. There shall be ruled in the yearly assessment-rolls of each section or ward a column headed "water rents" in which immediately after the confirmation of such assessment-rolls, the collector of assessments and arrears shall cause to be entered opposite the ward, lot, town block and map numbers of the property on which the said arrears may be due, the amounts due for "water rents" and the expenses of meters, with their connections and setting, water rates and other lawful charges for the supply of water measured by meters, as transmitted to him by the commissioner of water supply, gas and electricity, in accordance with the law, and the same shall be collected at the same time and in the same manner as the taxes to which they shall be added. (*As amended by L. 1908, ch. 490, § 10.*)

Arrears likewise to be provided for. (See 3d Ed., p. 743.)

§ 1025. There shall be ruled in the yearly assessment-rolls of the taxes in each section or ward, a column headed "arrears," in which the collector of assessments and arrears shall annually, before any taxes for the year are collected, cause to be entered the word "arrears" opposite to the ward, lot, town block and map numbers on which any arrears of taxes, or of taxes with the water rent added, shall be due, or on which any assessment shall remain unpaid which was due or confirmed one month prior to the first of January, then last past.

§ 14. This act shall take effect on the first day of January in the year nineteen hundred and twelve; provided, however, that where by the terms of this act and of the Greater New York charter as hereby amended, it is provided that any act or thing shall be done prior to January first, nineteen hundred and twelve, in order to effectuate and carry out the levy and collection of taxes for the year nineteen hundred and twelve, then as to such acts and things, this act shall take effect from and after its passage and shall be in force immediately, anything herein contained to the contrary notwithstanding; and provided further that nothing in this act contained shall in any wise affect or invalidate the taxes levied or to be levied in the city of New York for the year nineteen hundred and eleven, or any prior year, or the collection thereof, and that in so far as the provisions of the Greater New York charter by this act amended in any wise affect the taxes levied or to be levied in the city of New York for the year nineteen hundred and eleven, or any year prior thereto, the sections of the Greater New York charter hereby amended are

to be deemed in full force and effect to the same extent as though this act had not been passed. (*As amended by L. 1911, ch. 455.*)

Bills for taxes to show arrears. (See 3d Ed., p. 743.)

§ 1026. There shall be ruled a column for "arrears" in every bill rendered for taxes for lots on which said arrears or assessments, or taxes with water rents added, may be due, as aforesaid, or may have been sold and yet be redeemable, in which shall be written opposite the entry of the ward, lot, town block and map number of said lot, "arrears" and at the bottom of said bill shall be printed: "Whenever any tax or assessment shall remain unpaid for three years or any water rent shall remain unpaid for four years the tax lien on the property will be sold to satisfy such arrears of taxes, assessments or water rents, and all taxes, assessments and water rents up to a day to be named in the advertisement of sale as stated therein. The columns for arrears indicate lots sold for arrears, or to be sold therefor; arrears to be paid and lots redeemed at the office of the collector of assessments and arrears." (*As amended by L. 1908, ch. 490, § 12.*)

Sales of tax liens for taxes and assessments; proceedings.

(See 3d Ed., p. 744.)

§ 1027. The right of the city to receive taxes, assessments and water rents and the lien thereof, may be sold by the city, and after such sale, shall be transferred, in the manner provided by this title. The right and lien so sold shall be called "tax lien" and the instrument by which it is assigned shall be called "transfer of tax lien." Whenever any tax on lands or tenements, or any assessments on lands or tenements for local improvements, shall remain unpaid for the term of three years from the time the same shall have been fully confirmed, so as to be due and payable and also whenever any water rents in said city shall have been due and unpaid for the term of four years from the time the same shall have been due, it shall and may be lawful, for the collector of assessments and arrears, under the direction of the comptroller, to advertise the tax liens on the said lands and tenements or any of them for sale, including in such advertisement the tax lien for all items up to a day named in the advertisement, and by such advertisement the owner or owners of such lands and tenements respectively shall be required to pay the amount of such tax, assessment, or water rents, with the said penalties thereon so remaining unpaid, together with the interest thereon at the rate of seven per centum per annum to the time of payment, with the charges of such notice and advertisement, to the said col-

lector, and notice shall be given by such advertisement that if default shall be made in such payment the tax lien on such lands and tenements will be sold at public auction at a day and place therein to be specified, for the lowest rate of interest, not exceeding twelve per centum per annum, at which any person or persons shall offer to take the same in consideration of advancing the said tax, assessment and water rents and penalties as the case may be, the interest thereon as aforesaid to the time of sale, the charges of the above mentioned notices and advertisement and all other costs and charges accrued thereon; and if, notwithstanding such notice, the owner or owners shall refuse or neglect to pay such tax, assessment, water rents and penalties, with the interests as aforesaid, and the charges attending such notice and advertisement, then it shall and may be lawful for the said collector under the direction of the said comptroller, to cause such tax lien on such lands and tenements to be sold at public auction, for the purpose and in the manner expressed in the said advertisement, and such sale shall be made on the day and at the place for that purpose mentioned in the said advertisement, and shall be continued from time to time, if necessary, until all the tax liens on the lands and tenements so advertised shall be sold. But the tax liens on houses or lots, or improved or unimproved lands, in the city of New York, shall not be hereafter sold at public auction for the non-payment of any tax, assessment, or water rents which may be due thereon, unless notice of such sale shall have been published once in each week successively for three months in the City Record and the corporation newspapers, which advertisement shall contain, appended to said notice, a particular and detailed statement of the property the tax lien on which is to be sold. Or the said detailed statement and description, instead of being published in the City Record and the corporation newspapers, shall, at the option of the said comptroller, be printed in a pamphlet, in which case copies of the pamphlet shall be deposited in the office of the said collector, and shall be delivered to any person applying therefor. And the notice provided for in this section to be given of the sale of tax liens on houses and lots and improved and unimproved lands shall also state that the detailed statement of the taxes, assessments, or water rents, and the property taxed, assessed, or on which the water rents are unpaid, is published in the City Record and the corporation newspapers, or in a pamphlet, as the case may be, and that copies of the pamphlet are deposited in the office of the said collector, and will be delivered to any person applying for the same. No other notice or demand of the tax, assessment or water rent shall be required to authorize the sale of tax liens on any lands and tenements

as hereinbefore provided. The collector of assessments and arrears may, with the written approval of the comptroller, cancel any certificate or lease for unpaid taxes, assessments and water rents, held by the city of New York, or to which the city has acquired the right, and upon such cancellation, the lien of such tax, assessment or water rent shall be and remain the same as if no sale for such unpaid tax, assessment or water rent had been made. (*As amended by L. 1908, ch. 490, § 13.*)

The provisions of §§ 1027 to 1045 of the Charter as amended by L. 1908, ch. 490, providing for the sale of tax liens by the city and for the foreclosure thereof by the purchaser *held*, constitutional and valid. *Gautier v. Ditmar*, 204 N. Y. 20, aff'g 144 App. Div. 721, 129 N. Y. Supp. 834.

§ 1028. Contiguous lots to be advertised as one parcel. (See 3d Ed., p. 746.)

Repealed by L. 1911, ch. 490.

Postponement of sales. (New.)

§ 1028. It shall be lawful for the comptroller to suspend or postpone any sale or sales of tax liens on lands and tenements or any portion thereof which shall have been advertised for sale, to any time not exceeding fifteen months from the day specified in any such advertisement. All sales which shall be so postponed or suspended may be made without further advertisement, other than a general notice of such postponement, to be published in the City Record and the corporation newspapers. (§ 1029 as amended by L. 1908, ch. 490, § 15.)

Sales of tax liens to be conducted by the collector of assessments and arrears. (New.)

§ 1029. The collector of assessments and arrears or his assistant shall conduct the sales hereinbefore provided to be made, and no auctioneer other than said collector or his assistant shall be employed to make such sale, and no auctioneers' fees shall be charged thereon. The comptroller shall require from each purchaser of a tax lien at the time of such sale a deposit on account of ten per centum of the amount of the tax lien purchased by him, and not later than thirty days from the date of sale, the balance shall be paid to the collector of assessments and arrears, at his office. If no bid shall be received for a tax lien offered for sale, the collector of assessments and arrears, for and on behalf of the city of New York, may bid in the said tax lien, and upon such bid, no deposit or pay-

ment in cash shall be required from the city. When the city has bid in any tax lien a transfer of tax lien to the city shall be executed by the said collector in the form and manner prescribed for other transfers of tax liens, and the city shall have the same rights in, to and under such transfer of tax lien as if the same had been bought by any other other* person. Transfers of tax lien shall be made and delivered to the purchaser without charge upon payment of the amounts therein shown to be due. In case any purchaser shall not complete his purchase in accordance with the terms prescribed as herein provided, then the amount deposited by him at the time of the sale shall be forfeited to the city, and the entire tax lien upon the lands affected by such purchase shall be sold again. Such resale shall be held at such time as the comptroller may direct and shall be advertised in the City Record and the corporation newspapers, in such manner and for such time, not less than two weeks, as the comptroller may direct. All deposits forfeited as aforesaid shall be paid into the general fund of the city of New York. (§ 1030 as amended by L. 1908, ch. 490, § 16.)

Transfers of tax liens. (New.)

§ 1030. A transfer of tax lien shall operate to transfer and assign the tax lien upon the lands or tenements described therein for the taxes, assessments and water rents, and penalties, the interest thereon, and the charges of the notices and advertisement given pursuant to section ten hundred and twenty-seven of this act, and all other costs and charges, so advertised for sale, free of all taxes, assessments and water rents, which accrued before the day of the date mentioned in the advertisement of the sale as stated therein, and to create a lien upon the property affected thereby for the interest to which the purchaser may be entitled under his bid, but subject to the lien for and right of the city to collect and receive all taxes, assessments and water rents which accrued or which became a lien on and after the day of the date of the first advertisement of such sale as stated therein. A transfer of tax lien shall contain a transfer and assignment by the city of the tax lien sold to the purchaser, the date of the sale, the aggregate amount of the tax lien so transferred, and the items of taxes, assessments, water rents, penalties, and interest composing the tax lien, the annual rate of interest which the purchaser has bid and will be entitled to receive, the date when the amount of the tax lien will be due, and a description of the real property affected by the tax lien, which description shall include the

* So in original.

name of the borough in which the property lies and shall refer for certainty to the designation of said lot on the tax map, by its lot number and the number of the block, ward or section in which it is contained, and such other identifying description as the collector of assessments and arrears may deem proper to add. Each transfer of tax lien shall be subscribed by or in behalf of the collector of assessments and arrears making the sale, or a successor in office of such collector, and shall be acknowledged by the officer subscribing the same in the manner in which a deed is required to be acknowledged to be recorded in the county in which the real property affected is situated. (*Added by L. 1908, ch. 490, § 18.*)

§§ 1031 to 1049 both inclusive. (Providing for sale of lands and tenements in New York City for unpaid taxes, assessments or water rents, and issuing of certificates on such sale, and for redemption from sales.) (*Repealed by L. 1908, ch. 490, § 17.*)

NOTE.—The above repealed sections are replaced by the following new sections 1030 to 1047 inclusive, providing a new scheme with the other sections amended by L. 1908, ch. 490, in reference to sale of tax liens.

Record of transfers of tax liens. (New.)

§ 1031. The collector of assessments and arrears shall keep in his office a public record of sales of tax liens, and a copy of each transfer of tax lien issued by him. Assignments of transfers of tax lien duly acknowledged may be filed and recorded in the office of the collector of assessments and arrears. A transfer of tax lien and any assignment thereof, duly acknowledged, shall be deemed conveyances under article eight of the real property law, and may be recorded in the office of the recording officer of any county in which the real property which it affects is situated. Transfers of tax lien and all assignments thereof shall be recorded by recording officers in the same manner as mortgages and assignments thereof, but without payment of tax under article fourteen of the tax law. The record in the office of the collector of assessments and arrears of sales of tax liens, of a transfer of tax lien, and of a copy of a transfer of tax lien, and of an assignment of a transfer of tax lien; a record of a transfer of tax lien in the office of a recording officer, and of an assignment of tax lien, duly acknowledged, in the office of a recording officer, shall each be evidence in any court in the state without further proof. A transcript of any record enumerated in this section, duly certified, shall be evidence in any court in the state with like effect as the original instrument of record. Neither the tax lien nor

the rights transferred or created by a transfer of tax lien shall be impaired by failure of a recording officer to record a transfer of tax lien made by the city through the collector of assessments and arrears. Unless a contrary intent appears, a tax lien shall be presumed to be satisfied and discharged whenever it shall appear from recorded instruments that the tax lien has been transferred or assigned to the owner of such lands or tenements, notwithstanding other intervening estates or liens. (*Added by L. 1908, ch. 490, § 18.*)

Rights of purchaser of tax lien. (New.)

§ 1032. The aggregate amount of each tax lien transferred pursuant to this title, shall be due three years from the date of the sale. Until such aggregate amount is fully paid and discharged, the holder of the transfer of tax lien shall be entitled to receive interest on such aggregate amount from the day of sale, semi-annually on the first day of January and July, at the rate which the purchaser shall have bid. At the option of the holder of any transfer of tax lien the aggregate amount thereof shall become due and payable after default in the payment of interest for thirty days or after default for six months after the delivery of transfer of tax lien in the payment of any taxes, assessments or water rents, which become a lien on and after the day of the date mentioned in the advertisement of the sale as stated therein, of the tax lien transferred by such transfer of tax lien. Any person having a legal or beneficial interest in property affected by a transfer of tax lien may satisfy the same before maturity upon giving thirty days' notice in writing to the holder thereof, of the day on which payment will be made and upon payment of the principal with interest at the rate bid to a time three months after the day so fixed for payment. If notice of intention to make payment be given as herein provided, and such payment be not made, then the whole amount of any tax lien concerning which such notice shall have been given shall become due and payable at the option of the holder thereof. Or any such person may pay to the collector of assessments and arrears such principal with interest at the rate bid up to a day six months after such payment. In case such payment be made to the collector of assessments and arrears he shall receive the same for the benefit of the holder of the tax lien thus discharged, and shall give notice thereof to the purchaser or the personal representative or assignee of the purchaser, by mail addressed to such address as may have been furnished to the collector of assessments and arrears. Upon receiving surrender of such transfer of tax lien the collector of assessments and arrears shall pay the amount thus deposited, to the person who according to the records in his

office appears to be entitled thereto, or to the personal representatives of such person. (*Added by L. 1908, ch. 490, § 18.*)

Discharge of tax lien. (New.)

§ 1033. A tax lien sold pursuant to the provisions of this title must be discharged upon the record thereof by the collector of assessments and arrears when payment is made to him of the principal and interest as provided in the last preceding section, and also when the transfer of tax lien is surrendered to him for cancellation and there is presented to him a certificate executed by the purchaser, or the personal representative or assignee of the purchaser, acknowledged so as to be entitled to be recorded in the county in which the real property affected by such tax lien is situated, certifying that the tax lien has been paid or has been otherwise satisfied and discharged. The transfer of tax lien thus surrendered and such certificate of discharge must be filed by the collector of assessments and arrears and he must note upon the margin of the record of such sale, upon such transfer of tax lien and upon the copy of the transfer of tax lien kept in his office a minute of such discharge and the date of filing thereof. If the transfer of tax lien shall have been lost or destroyed or mutilated, if payment be made to the collector of assessments and arrears, or if a certificate of discharge be filed as hereinafter provided, application for an order dispensing with the surrender of the transfer of tax lien may be made in the same manner as is provided in section two hundred and seventy-a of the real property law, the provisions of which so far as the same may be, are hereby made applicable to discharge of tax liens. The collector of assessments and arrears shall upon demand issue his certificate showing the discharge of any tax lien which may have been duly discharged as provided in this section, and such certificate may be filed in any office where the transfer of tax lien is recorded, and any recording officer with whom such a certificate is filed, shall record the same, and upon the margin of the record of such transfer of tax lien in his office shall note a statement that the same has been discharged with a reference to the record of such certificate in his office. (*Added by L. 1908, ch. 490, § 18.*)

Exemption from taxation. (New.)

§ 1034. Tax liens and transfers of tax liens shall be exempt from taxation by the state or any local subdivisions thereof, except from the taxes imposed by article ten of the tax law. The real property affected by any tax lien shall not be exempt from taxation by reason of this section. (*Added by L. 1908, ch. 490, § 18.*)

Corporation to take possession of unclaimed lands. (New.)

§ 1035. If the amount of any tax lien which shall have been transferred by a transfer of tax lien shall not be paid when under its terms and the provisions of this title such amount shall be due, the holder of such tax lien may maintain an action in the supreme court to foreclose such tax lien. In an action to foreclose a tax lien any person shall be a proper party of whom the plaintiff alleges that such person has or may have or that the plaintiff has reason to believe that such person has or may have an interest in or claim upon the real property affected by the tax lien. Except as otherwise provided in this title an action to foreclose a tax lien shall be regulated by the provisions of the code of civil procedure and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property. The people of the state of New York may be made party to an action to foreclose a tax lien in the same manner as a natural person. Where the people of the state of New York or the city of New York is made a party defendant the complaint shall set forth, in addition to the other matters required to be set forth by law, detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York or the city of New York, and detailed facts showing the particular nature of the interest in or the lien on said real property which plaintiff has reason to believe that the people of the state of New York or the city of New York has or may have in the said real property, and the reason for making the people of the state of New York or the city of New York a party defendant. Upon failure to state such facts the complaint shall be dismissed as to the people of the state or the city of New York. (*As amended by L. 1911, ch. 65.*)

Pleading transfer of tax lien. (New.)

§ 1036. Whenever a cause of action, defense or counterclaim, is for the foreclosure of a tax lien, or is in any manner founded upon a tax lien or a transfer of tax lien, the production in evidence of an instrument executed by the collector of assessments and arrears, in the form prescribed in section ten hundred and thirty for a transfer of tax lien subscribed by or in behalf of a collector of assessments and arrears, shall be presumptive evidence that the lien purported to be transferred by such an instrument was a valid and enforceable lien, and that it has been duly assigned to the purchaser, and it shall not be necessary to plead or prove any act, proceeding, notice or action, preceding the delivery of such transfer of tax lien nor to establish the validity of the tax lien transferred by such transfer

of tax lien. If a party or person in interest in any such action or proceeding claims that a tax lien is irregular or invalid, or that there is any defect therein or that a transfer of tax lien is irregular, invalid or defective, such invalidity, irregularity or defect must be specifically pleaded or set forth, and must be established affirmatively by the party or person pleading or setting forth the same. (*Added by L. 1908, ch. 490, § 18.*)

Judgment upon tax lien. (New.)

§ 1037. In every action for the foreclosure of a tax lien, and in every action or proceeding in which a cause of action, defense or counterclaim is in any manner founded upon a tax lien or a transfer of tax lien, such transfer of tax lien and the tax lien which it transfers shall be presumed to be regular and valid and effectual to transfer to the purchaser named therein a valid and enforceable tax lien. Unless in such an action or proceeding such tax lien or transfer of tax lien be found to be invalid, they shall be adjudged to be enforceable, and valid, for the amount thereof and the interest to which the holder may be entitled, and a tax lien transferred by a transfer of tax lien effectual to transfer such tax lien to the purchaser named therein. (*Added by L. 1908, ch. 490, § 18.*)

Judgment of foreclosure of tax lien. (New.)

§ 1038. In an action to foreclose a tax lien, unless the defendants obtain judgment, the plaintiff shall be entitled to a judgment establishing the validity of the tax lien so far as the same shall not be adjudged invalid and of the transfer of tax lien, and directing the sale of the real property affected thereby, or such part thereof as shall be sufficient to discharge the tax lien, or such items thereof as shall not be adjudged invalid and the interest thereon and all other accrued taxes, assessments and water rents affecting the real property, together with the expenses of the sale, and the costs of the action. (*Added by L. 1908, ch. 490, § 18.*)

Effect of judgment foreclosing tax lien. (New.)

§ 1039. Every final judgment in an action to foreclose a tax lien shall be binding upon, and every conveyance upon a sale pursuant thereto, shall transfer to and vest in the purchaser all the right, title, interest and estate in and claim upon the real property affected by such judgment, of the plaintiff, each defendant upon whom the summons is served, each person claiming from, through or under such a defendant by title accruing after the filing of notice

of pendency of the action or after the entry of judgment and filing of the judgment roll in the proper county clerk's office, and each person not in being when the judgment is rendered, who afterwards may become entitled to a beneficial interest attaching to, or an estate or interest in such real property or any portion thereof, provided that the person presumptively entitled to such beneficial interest, estate or interest is a party to such action or bound by such judgment. So much of section four hundred and forty-five of the code of civil procedure as requires the court to allow a defendant to defend an action after final judgment shall not apply to an action to foreclose a tax lien. Delivery of the possession of real property affected by a judgment to foreclose a tax lien may be compelled in the manner prescribed in section sixteen hundred and seventy-five of the code of civil procedure. (*Added by L. 1908, ch. 490, § 18.*)

Surplus. (New.)

§ 1040. Any surplus of the proceeds of the sale, after paying the expenses of the sale, and all taxes, assessments and water rents, which accrued or became a lien on and after the day of the date mentioned in the advertisement of the sale as stated therein, under which the foreclosed transfer of tax lien was issued, and satisfying the amount of the tax lien and interest and the costs of the action, must be paid into court for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, and no application has been made therefor, the court must, and, if an application therefor is pending, the court may direct such surplus to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court. (*Added by L. 1908, ch. 490, § 18.*)

Foreclosed tax lien not arrears. (New.)

§ 1041. Any party to an action to foreclose a tax lien or any purchaser or any party in interest may give notice of such foreclosure to the collector of assessments and arrears, and after such notice the items which constituted the tax lien thus foreclosed shall not be entered by the collector of assessments and arrears in any yearly assessment-roll, so long as the judgment of foreclosure of such lien remains in force. (*Added by L. 1908, ch. 490, § 18.*)

Procedure when no bid for a tax lien is received. (New.)

§ 1042. If no bid be received for a tax lien on any parcel of property at a duly advertised sale and it shall appear to the comptroller that the taxes, assessments, water rents, penalties and accrued interest amount to so large a proportion of the value of the property that the

security is insufficient to attract bidders, then and in that event the comptroller and the corporation counsel shall investigate the facts and may fix a lesser amount for which in their judgment a tax lien bearing twelve per centum interest can be sold. A certificate in writing, signed by them, shall be filed with the collector of assessments and arrears, setting forth the amount so determined by them, together with a brief statement of the reasons for such reduction, which certificate shall include the total amount of the taxes, assessments, water rents, penalties and accrued interest, the assessed value of such parcel of real estate, and the value of the land as the same appears on the last preceding assessment-roll. Thereafter such reduced amount shall constitute the tax lien upon said real property for the items therein enumerated, unless the same be increased as hereinafter provided, which reduced amount shall bear interest at the rate of seven per centum per annum from the date of such certificate until fully paid, or until the tax lien thus fixed, together with the lien for any other taxes, assessments, water rents, and penalties and interest becoming liens thereafter shall be sold. The collector of assessments and arrears shall forthwith advertise the tax lien for such reduced amount for sale to the highest bidder in the manner provided for the advertisement for the sale of ordinary tax liens. Such tax lien shall bear interest at twelve per centum and shall be sold to the person bidding the highest amount of money in excess of the reduced amount so fixed by the comptroller and corporation counsel, provided that if the bidding reaches the original amount of the tax lien on the real property affected, together with all interest and penalties thereon, the sale shall proceed in the manner provided in section ten hundred and twenty-nine; if such tax lien be sold for a sum greater than the reduced amount fixed as aforesaid with the interest and penalties thereon, then such greater amount shall be considered the tax lien upon the real property affected thereby. If no bid shall be received at such sale, the comptroller and corporation counsel shall reconsider their determination and may file a new certificate in the manner hereinbefore provided, and the collector of assessments and arrears shall proceed again as hereinbefore directed. Such procedure shall be repeated until a tax lien for such taxes, assessments, water rents and accrued interest shall be sold. (*Added by L. 1908, ch. 490, § 18.*)

Reimbursement for defective tax liens or transfers of tax liens. (New.)

§ 1043. If a transfer of tax lien be vacated or be set aside or canceled, or if it be adjudged in any action that a transfer of tax lien

is invalid or defective, or not sufficient to transfer a tax lien to the purchaser thereof, or if in any action to foreclose a tax lien, it be adjudged that the entire tax lien is void and not a valid lien on the premises which it purports to affect, and that the complaint be dismissed, the purchaser may surrender such transfer of tax lien, together with a certified copy of such judgment or decree, to the collector of assessments and arrears and thereupon shall be repaid by the city the amount paid for such transfer of tax lien, with interest from the time of such payment at the rate set forth in the transfer of tax lien, and the city shall pay the taxed costs and disbursements of any action or proceeding in which such adjudication is made. (*Added by L. 1908, ch. 490, § 18.*)

Reimbursement when part of tax lien is defective. (New.)

§ 1044. If, in any action to foreclose a tax lien, it shall be adjudged that some, but not all of the items constituting such tax lien are void and not a valid lien on the premises covered by such tax lien, or if in any action or proceeding it be adjudged that a transfer of tax lien is invalid or defective, as to some though not as to all of the items transferred, the holder of the transfer of tax lien, by instrument in writing duly acknowledged, shall retransfer to the city the items thus affected, and shall be repaid by the city such portion of the amount paid for such transfer of tax lien as may be applicable to the items thus affected, with interest from the time of such payment at the rate set forth in the transfer of tax lien, and the city shall pay the taxed costs and disbursements of any action or proceeding, other than an action to foreclose the tax lien, in which such adjudication is made. The provisions of this section shall not apply to a tax lien which has been reduced as provided in section ten hundred and forty-three, unless by such an adjudication the amount of the tax lien which shall remain valid and enforceable, be reduced below the sum bid for the same and the interest thereon at the rate to which the holder of the transfer of tax lien is entitled, and the amount repaid by the city shall not exceed the difference between the sum to which the tax lien has been reduced, and the sum paid therefor, with interest thereon at the rate to which the holder of the transfer of tax lien is entitled. (*Added by L. 1908, ch. 490, § 18.*)

Owners may question transfers of tax liens. (New.)

§ 1045. Any person interested in or holding a lien upon any real property affected by any unpaid tax lien or transfer of tax lien, may file a written notice with the collector of assessments and arrears claiming that a transfer of tax lien is invalid or defective or

that a tax lien which has been transferred pursuant to this title or which is advertised to be transferred is invalid, defective, void or ineffectual, or should be vacated or set aside, The collector of assessments and arrears shall transmit all such notices to the corporation counsel, who shall examine into the facts and proceedings resulting in the tax lien or transfer of tax lien mentioned in such notice; before a determination is had the corporation counsel shall serve a copy of such notice upon the holder of the transfer of tax lien which is thus questioned or which transfers the items thus questioned and shall give such holder an opportunity to be heard. The corporation counsel shall certify in writing his opinion upon the matters and questions raised by such notice, and if he concludes that a defense in an action to foreclose the tax lien would succeed in whole or in part he shall so certify, and shall recommend what action shall be taken by the city concerning the same. If the corporation counsel concludes that such defense would succeed in whole or in part and recommends repayment by the city of the amount paid for a transfer of tax lien which would be applicable to any item, he shall state the reasons for such recommendation, and if it be approved by the comptroller the city shall require the surrender of the transfer of tax lien or the retransfer to it of the item or items of tax lien which are found to be void or defective, and shall make repayment therefor in the same manner as if such transfer of tax lien, tax lien or items had been adjudicated in the manner provided in sections ten hundred and forty-three and ten hundred and forty-four. Neither the provisions of this section nor any act or proceeding thereunder shall impair or in any other manner affect the rights or remedies of any person interested in, or holding any lien upon, real property to question the validity of any tax, assessment, water rents or tax lien, or any part or item of any tax lien. (*Added by L. 1908, ch. 490, § 18.*)

Corporation counsel to protect interest of city. (New.)

§ 1046. No claim shall be made against the city under sections ten hundred and forty-three, ten hundred and forty-four or ten hundred and forty-five by the holder of any tax lien, unless action to foreclose the tax lien or transfer of tax lien upon which such claim is founded be commenced within five years from the time of the sale resulting in such transfer of tax lien. Nor shall any claim be made against the city under sections ten hundred and forty-three or ten hundred and forty-four, unless within ten days after the commencement of any action or proceeding to vacate, set aside or cancel a transfer of tax lien, or a tax lien or an item mentioned

in a transfer of tax lien, or unless within ten days after the service of any pleading or other paper in an action or proceeding in which any transfer of tax lien, or item mentioned in a transfer of tax lien, is brought into question, sought to be set aside, vacated, or canceled, or which sets forth or pleads any defense to an action to foreclose a tax lien, a notice in writing be served upon the corporation counsel setting forth the question or objection raised to the best knowledge of the holder of the transfer of tax lien, or his attorney at law, and demanding that the city take up the prosecution or defense of the action or proceeding. All proceedings in such action or proceeding shall be stayed for thirty days or such shorter time as the corporation counsel shall stipulate in writing. It shall be the duty of the corporation counsel to examine the questions raised, and, in order to protect the interests of the city, he shall have the right to be substituted for the attorney of record of the holder of the transfer tax lien, or to appear as attorney of record for the holder of any such transfer of tax lien, to conduct or defend any such action or proceeding in the name of the holder of the transfer of tax lien, and to bring any other action or proceeding for, on behalf of and in the name of the holder of such transfer of tax lien as he may deem advisable, to take appeals, and to argue appeals taken by the adverse party, as he may deem advisable. It shall be the duty of the corporation counsel to protect the interest of the city in all matters, actions and proceedings relating to tax liens and transfers of tax liens; to intervene on behalf of the city or of the holder of a transfer of tax lien in, or to make the city a party to any action in which he believes it to be to the interest of the city so to do, by reason of any matter arising under or relating to any tax lien or transfer of tax lien, or advertisement of sale of tax liens. In any action or proceeding in which the corporation counsel pursuant to this section shall be substituted, or shall appear, it shall be without expense to the holder of the transfer of tax lien, and all costs recovered on behalf of such holder of a transfer of tax lien in any action or proceeding conducted or defended by the corporation counsel shall belong to the city and shall be collected, applied and disposed of in the same manner as are other costs recovered by the city. (*Added by L. 1908, ch. 490, § 18.*)

Defective or invalid transfer of tax lien; proceeding anew.
(New.)

§ 1047. If a transfer of tax lien be vacated or be set aside or canceled or if it be adjudged that a transfer of tax lien is invalid or defective, or insufficient to transfer a tax lien to the purchaser thereof,

or if in any action to foreclose a tax lien, it be adjudged that a tax lien is not a valid lien on the premises which it purports to affect, because of some irregularity in the proceedings had, and if, in pursuance of any such adjudication the purchaser of said transfer of tax lien shall have surrendered such transfer of tax lien to the collector of assessments and arrears and shall have been repaid by the city, the amount paid for such transfer of tax lien, with interest and costs and disbursements of the said action or proceeding in which such adjudication was made, then and in that event, the tax lien which was purported to be transferred and assigned in such transfer of tax lien shall remain as a valid lien upon the premises which it affects, except to such extent as it may have been adjudged irregular or invalid, and the collector of assessments and arrears shall proceed to sell anew, as provided in section ten hundred and twenty-seven of this act, so much of the said tax lien as is not invalid as if no prior sale purporting to transfer the said tax lien had taken place. (*Added by L. 1908, ch. 490, § 18.*)

Lost transfer of tax lien; delivery of duplicate in case of.
(New.)

§ 1048. Whenever any transfer of tax lien given by the collector of assessments and arrears, as in this title provided, shall be lost, the comptroller may receive evidence of such loss, and on satisfactory proof of the fact may direct the collector of assessments and arrears to execute and deliver a duplicate to such person or persons who shall appear entitled thereto, and may also, in his discretion, require a bond of indemnity to The City of New York. (§ 1050, *as amended by L. 1908, ch. 490, § 19.*)

Bills of arrears of taxes and assessments to be furnished when requested. (New.)

§ 1049. The collector of assessments and arrears, upon the requisition of the owner, the proposed vendee under a contract of sale, a mortgagee, or any person having a vested or contingent interest in any lot or lots, or their duly authorized agent, shall furnish a bill of all arrears of taxes, and of taxes with the "water rents" added on any lot or lots due prior to the first of March, then last past, and of assessments which are due and payable; and upon the payment of the said bill (which shall be called a "bill of arrears of assessments, taxes and water rents"), his receipt thereon, countersigned by the comptroller, shall be conclusive evidence of such payment. The comptroller shall cause to be kept a duplicate account of amounts so collected, and the certificate of the collector of assessments and

arrears, countersigned by the comptroller, that there are no tax liens on said lot or lots, shall forever free the said lot or lots from all liens of taxes, or for taxes with water rates added, or for rents of water added to the taxes prior to the first of March then last past, and for all assessments due and payable prior to the date of the said receipt or certificate, but not from the lien of any tax lien duly sold. (*As amended by L. 1911, ch. 673.*)

§ 1052. (Fees for searches in office of collector of assessments and arrears.) *Renumbered as § 1050 by L. 1908, ch. 490, § 21.*

§ 1053. (Requiring record of sales for taxes, assessments and water rents to be kept in office of collector of assessments and arrears.) *Repealed by L. 1908, ch. 490, § 22.*

§ 1054. (Requiring affidavits of publication of notices in reference to tax liens to be preserved in office of collector of assessments and arrears.) *Renumbered as § 1051 by L. 1908, ch. 490, § 23.*

§ 1055. Board of education, property under its care and control; in what name suits brought. (See 3d Ed., p. 760.)

Liability for negligence.

While the power to repair and keep in good condition the school buildings of the city is not given by the charter to the board of education, so that the board is not liable under the doctrine of *respondet superior* for the negligence of those having in charge the care and repair of such buildings, yet the board is vested with the management and control of the public schools, including the sole power to close them, so that if there is any negligence with reference to such closing, it must be that of the board. Accordingly, where in an action against the board by a pupil for injury received from the falling of a ceiling in a school room, there being evidence that the school house and ceiling were out of repair, that the ceiling had been examined by inspectors appointed by the board, who had noticed that the ceiling was cracked and liable to fall, and had reported such fact to the board, *held* that the board was liable to the injured pupil for its negligence, allowing the school building to be occupied after it had knowledge of the unsafe condition of the building and ceiling. *Wahrman v. Board of Education*, 187 N. Y. 331, *aff'd* 111 App. Div., 345, 97 N. Y. Supp. 1066, distinguished in *Higbie v. Board of Education*, 122 App. Div. 483, 107 N. Y. Supp. 168.

It seems that the board of education is vested with the duty of cleaning the public schools and therefore, the board is liable for injuries sustained by

one employed as a cleaner in such schools. *Higbie v. Board of Education*, 122 App. Div. 483, 107 N. Y. Supp. 168, distinguishing *Wahrman v. The Same*, 187 N. Y. 331.

The duty of keeping its streets in a fit condition for travel rests upon the city, and therefore the city is liable for damages occasioned by reason of a fall upon ice which the city had allowed to accumulate in front of premises occupied by the board of education for school purposes. *Pymm v. City of New York*, 111 App. Div. 330, 97 N. Y. Supp. 1108.

The city has a right to assume that the board of education, which is a separate corporation, will perform its duty and keep the walks in front of public schools free from snow and ice, in the absence of any notice to the contrary. Notice of an accumulation of ice and snow on a sidewalk in front of a public school, to the principal, janitor and assistant janitor of the same and to an inspector of the board of education, does not constitute notice to the city of the damaged condition of the sidewalk. *Owen v. City of New York*, 141 App. Div. 217, 126 N. Y. Supp. 38.

Costs against board.

Costs are recoverable in an action against the board of education under Code Civil Procedure, § 3245, provided the claim before suit was presented to the Comptroller of the City of New York, who is the "chief fiscal officer" of the board of education, within the meaning of that term in the section of the Code cited. *Eagan v. Board of Education*, 115 N. Y. Supp. 167.

Power to contract for electric light.

The board of education is the sole representative of the school system of the city with exclusive powers to control, manage, and administer all school property and school funds. The only relation that the city has to the subject of public education is as the custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disburse the same according to the instructions of the board of education. So *held*, holding, that the board of education had the power to contract for electric current for the lighting of public schools and that an action to recover moneys due under the contract was properly brought against the board of education, and not against the city. *The United Electric Light & Power Co. v. Board of Education*, MacLean, J., Sp. T., N. Y. Law Jour., May 18th, 1909.

Board of education; to dispose of personal property; disposition of proceeds; to lease property and make contracts. (See 3d Ed., p. 767.)

§ 1066. The board of education shall have power, in the name of The City of New York and for said city, to dispose of such personal property used in the schools or other buildings under the

charge of said board as shall no longer be required for use therein, and to sell at prevailing market prices such manufactured articles or other products of its vocational, trade, preparatory trade schools, and truant schools, day and evening, as may not be utilized by the board of education, and all moneys realized by the sale thereof shall

and shall at once be appropriated by

§ 1068. Board of education; power to enact by-laws, rules and regulations. (See 3d Ed., p. 768.)

A by-law made by the board of education under the power conferred by this section imposing a fine upon a janitor is binding upon him and he cannot recover the amount of such fine imposed for violation thereof.

Board of examiners; teachers' licenses, et cetera.

§ 1089. A board of examiners is hereby constituted whose duty it shall be to examine all applicants who are required to be licensed in and for the city of New York, and to issue to those who pass the required tests of character, scholarship and general fitness, such licenses as they are found entitled to receive. Such board of examiners shall consist of the city superintendent of schools, together with four persons appointed by the board of education upon the nomination of the city superintendent. The terms of the first four examiners so appointed shall be one, two, three and four years, respectively, and as their terms respectively expire, their successors shall be appointed for a full term of six years, which shall thereafter be the full and regular term of office of said examiners. They shall be paid such compensation as the board of education shall prescribe. The city superintendent of schools shall have power with the consent of the board of education to employ assistants temporarily at rates to be fixed by the board of education. To be eligible to appointment as an examiner, an applicant must possess some one of the following qualifications, to wit:

(a) A degree or diploma of graduation from a college or university recognized by the regents of the university of the state of New York, together with at least five years' successful experience in teaching since graduation.

(b) A state certificate obtained as the result of an examination held since eighteen hundred and seventy-five, together with at least ten years' successful experience in teaching.

(c) The highest certificate for a principal or superintendent in force when this act takes effect in any city included in the city of New York as constituted by this act, together with at least ten years' successful experience in teaching. No associate city superintendent, district superintendent, principal or teacher in the city of New York shall be allowed to serve on the board of examiners. The board of education on the recommendation of the board of superintendents shall designate, subject to the requirements of the state school law in force when this act takes effect or that may thereafter be enacted, the kinds or grades of licenses to teach which may or shall be used in the

of the members of the board of education, the members of the local school boards, the associate city superintendents, the district superin-

teachers in high schools by the old city of Brooklyn, *held* not entitled to be placed upon the eligible list for the position of head of department in the absence of proof of a by-law of the board of education of Brooklyn making the holder of such a certificate eligible to appointment as head of department. *Hazen v. Board of Education*, 127 App. Div. 235, 111 N. Y. Supp. 337.

See cases cited under § 1090, *post*.

§ 1090. Appointment and resignation of principals and teachers. (See 3d Ed., p. 785.)

Appointment of teachers.

Mandamus will not lie to compel the board of education to appoint a school teacher to a position to which he claims to be entitled, as matter of right where the application for the writ was not made within forty days from the filing of the relators' nomination by the board of superintendents in the office of the secretary of the board of education and while a vacancy still existed to which the board could have appointed the relator. *Norman v. Board of Education*, 203 N. Y. (memo.), p. 22.

long continued, does not constitute a permanent appointment to the position. *Hoefling v. Board of Education*, 120 App. Div. 545, 104 N. Y. Supp. 941; *Hazen v. Board of Education*, 127 App. Div. 235, 111 N. Y. Supp. 337; see also cases cited under § 1091, *post*.

Under the by-laws of the board of education providing that in schools of less than five classes, extra compensation shall be paid to a teacher of the highest grade for acting as senior teacher in charge of the school, a teacher holding a certificate of the highest grade, who was appointed by the principal of a school, to the knowledge of the district superintendent to act in such capacity, can recover the additional compensation, although he was not appointed to the position either by the school board or later by the board of education. *Dildine v. Board of Education*, 133 App. Div. 261, 117 N. Y. Supp. 578.

Transfer of teachers.

The provision of this section that a teacher shall not be transferred from a school in one borough to a school in another borough without his or her consent. *Held*, to apply only to teachers and not to be applicable to a prin-

Board of education; power to fix salaries; method regulating.

§ 1091. The board of education shall have power to adopt by-laws fixing the salaries of all members of the supervising and the teaching staff; and the salaries of all principals and teachers shall be regulated by merit, grade of class taught, length of service, experience in teaching, or by a combination of these considerations. Such by-laws shall establish a uniform schedule of salaries for the supervising and the teaching staff throughout all boroughs.

The salaries of the members of the supervising and teaching staffs shall be as follows:

The salary, including the annual increment, to which a present member is entitled under a specific salary schedule now existing shall not be reduced, nor shall any position in the elementary schools to which any member of the supervising or teaching staff was eligible on December thirty-first, nineteen hundred and eleven, be abolished by the operation of this act. Beginning with the first day of January, nineteen hundred and twelve, third month following the taking effect of this act, the salaries, including the annual increments, of all members shall be not less than those fixed in the schedules and schedule conditions approved by the board of education on the seventeenth and twenty-fourth days of May, nineteen hundred and eleven. After said date, if a present male member be advanced to a position

clusive on all matters pertaining to experience therein stated, and shall entitle their holders to salaries in accordance with the schedules of salaries established in conformity with this section, in like manner as though the years mentioned in such certificates had been served at those schools of the city of New York that are respectively mentioned in such certificates. (As amended by L. 1912, ch. 459.)

position shall be that fixed in the schedule therefor in force at the time of such advance, except that it shall be not less than that received by him immediately prior to such advance. The salary of a principal, assistant to principal or head of a department shall be not less than that now fixed for any regular teacher in the elementary schools. In the schedules of salaries hereafter adopted there shall be no discrimination based on the sex of the member. A copy of such schedules and schedule conditions approved by the board of education on the seventeenth and twenty-fourth days of May, nineteen hundred and eleven, certified by the secretary of the board, shall, within thirty days hereafter, be filed in the office of the secretary of state.

The board of examiners shall issue to a principal or a teacher who has had experience in schools other than the schools in The City of New York, a certificate stating that the experience of such teacher is equivalent to a certain number of years of experience in the schools of the said city. The board of examiners shall issue to a principal or teacher who has had experience in schools other than the high and training schools of The City of New York, a certificate stating that the experience of such teacher is equivalent to a certain number of years of experience in the high and training schools of the said city. Such certificates made by the board of examiners shall be final and conclusive on all matters pertaining to experience therein stated, and shall entitle their holders to salaries in accordance with the schedules of salaries established in conformity with this section, in like manner as though the years mentioned in such certificates had been served in those schools of The City of New York that are respectively mentioned in such certificates. (*As amended by L. 1911, ch. 902.*)

Salaries of supervising and teaching staff.

This section vests the board of education with absolute discretion to fix salaries from time to time, limited only by the provisions in regard to minimum salaries. An employee of the department has no vested right to the compensation fixed by resolution of the board of education, but the board has power by subsequent resolution to reduce such compensation to the minimum provided by the statute. *Buckbee v. Board of Education*, 115 App. Div. 366, 100 N. Y. Supp. 943, rev'g 51 Misc. 295, 100 N. Y. Supp. 1063.

A teacher temporarily assigned to perform the duties of a higher grade does not thereby become entitled permanently to the salary of such grade and where the higher grade has been filled by a permanent appointment and the teacher is reassigned to her former grade, she is only entitled to the salary of the latter grade. *Hoefling v. Board of Education*, 120 App. Div. 545, 104 N. Y. Supp. 941; *Hazen v. Board of Education*, 127 App. Div. 235, 111

N. Y. Supp. 337; *Wood v. Board of Education*, 59 Misc. 605, 112 N. Y. Supp. 578; *Thomas v. Board of Education*, 201 N. Y. 457.

The provisions of this section demand that the salaries of teachers of the same grade shall be uniform, and therefore a teacher whose salary at the time of the passage of the act, was higher than that fixed by the board of education for the same grade is not entitled to the annual increase provided for by this section until the salary attached to the grade through annual increase became equal to her salary. *McHench v. Board of Education*, 127 App. Div. 294, 111 N. Y. Supp. 303; *Loewy v. Board of Education*, 59 Misc. 70, 112 N. Y. Supp. 4.

Whether the acceptance by a school teacher of a sum less than that attached to the grade she has been employed to teach, operates as a waiver of the salary she should have received, see cases cited under § 1101, *post*.

The scheme of compensation under this section, as amended by L. 1900, ch. 751, known as the "Davis Law," to teachers in the school system beginning with the creation of the greater city, has been upon a basis of progression, regulated by the length of service and by experience in teaching. The provision of this section that no salary theretofore paid to any member of the supervising and the teaching staff of any of the public schools in the city shall be reduced by the operation of this section (re-enactment of L. 1899, ch. 417), did not affect the salaries of high school teachers in the Borough of Brooklyn as established on April 1st, 1899, by the by-laws of the school board of Brooklyn. L. 1900, ch. 751, known as the "Davis Law" amending this section, provides for the salary of high school teachers, fixing them the same as in the schedule of the by-laws mentioned. *Held*, that the word "rate" as used in the by-law, did not mean a fixed amount, but a progressive salary, and therefore the by-law did not make the rates recited in the schedule fixed and unchangeable. *Williams, J.*, in Municipal Court of New York, Borough of Brooklyn, 4th Dist., *Holmes v. Board of Education*, 120 N. Y. Supp. 284.

Salaries of employees and clerks.

See cases cited under § 1067, *ante*.

Evening schools.

The provisions of this section fixing a minimum salary for school teachers has no application to teachers in the evening schools. *Morris v. Board of Education*, 54 Misc. 605, 104 N. Y. Supp. 979.

Respecting the compensation of evening school teachers, see cases cited under § 1069, *ante*.

Certificate of service in schools outside city.

Certiorari will not lie to review the action of the board of examiners in refusing to certify under this section that the experience of a teacher in schools

other than high and training schools of the city is equivalent to a certain length of experience in such high and training schools. *People ex rel. McNulty v. Maxwell*, 123 App. Div. 591, 108 N. Y. Supp. 49.

Public school teachers' retirement fund. (See 3d Ed., p. 790.)

§ 1092. The general care and management of the public school teachers' retirement fund created for the former city of New York by chapter two hundred and ninety-six of the laws of eighteen hundred and ninety-four, and of the public school teachers' retirement fund created for the former city of Brooklyn, by chapter six hundred and fifty-six of the laws of eighteen hundred and ninety-five, is hereby given to the board of education, and the said funds are hereby made parts of the retirement fund of the board of education of the city of New York created by this act. The board of education shall from time to time, establish such rules and regulations for the administration of said fund as it may deem best, which rules and regulations shall preserve all rights inhering in the teachers of the city of New York and the city of Brooklyn as constituted prior to the passage of this act; and said board shall make payments from said fund of annuities granted in pursuance of this act. The comptroller of the city of New York shall hold and invest all money belonging to said fund, and by direction of said board of education shall pay out the same; and he shall report in detail to the board of education of the city of New York, annually, in the month of January, the condition of said fund and the items of the receipts and disbursements on account of the same. The said retirement fund shall consist of the following, with the interest and income thereof: (1) All money, pay, compensation or salary, or any income thereof forfeited, deducted, reserved, or withheld for any cause from any member or members of the teaching or supervising staff of the public day schools of the city of New York or of the normal college and training department of the normal college of the city of New York, or of schools or classes maintained in institutions controlled by the department of public charities or by the department of correction, in pursuance of rules established or to be established by the board of education, or by the board of trustees of the normal college of the city of New York, or by the commissioner of public charities, or by the commissioner of correction for schools or classes maintained by such commissioners respectively. The auditor of the board of education, the auditor of the board of trustees of the normal college, the commissioner of public charities, and the commissioner of correction shall certify monthly to the comptroller the amounts so forfeited, deducted, reserved or withheld during the preceding month.

Said amounts shall be turned into the said retirement fund. (2) All moneys received from donations, legacies, gifts, bequests, or otherwise for or on account of said fund. (3) Five per centum annually of all excise moneys or license fees belonging to the city of New York, and derived or received by any commissioner of excise or public officer from the granting of licenses or permission to sell strong or spirituous liquors, ale, wine, or beer in the city of New York, under the provisions of any law of this state authorizing the granting of such license or permission. (4) One per centum of the salaries of all members of the teaching and supervising staff of the public day schools of the city of New York, and of the normal college and training department of the normal college of the city of New York, and of schools or classes maintained in institutions controlled by the department of public charities or by the department of correction of the city of New York, except that the amount deducted from the salary of any teacher or principal of the public day schools of the city of New York or of schools or classes maintained in institutions controlled by the department of public charities, or by the department of correction of the city of New York, in this manner, shall not exceed thirty dollars in any one year, and the amount deducted from the salary of any supervising official, in this manner, shall not exceed forty dollars in any one year. And the board of education, the board of trustees of the normal college, the commissioner of public charities, and the commissioner of correction shall, after the passage of this act, deduct on each and every pay roll of the said teaching and supervising staff said one per centum from each and every amount earnable in the period covered by the said pay roll, notwithstanding the minimum salaries provided for by section ten hundred and ninety-one of the charter shall be thereby reduced, and shall certify monthly to the comptroller the amounts so deducted; and said amounts shall be turned into the said retirement fund. All deductions made under the provisions of this clause from the salary of any person who may be dismissed from the service for cause, before said person shall have become eligible for retirement, under the provisions of this act, shall be refunded to said person upon such dismissal. (5) All such other methods of increment as may be duly and legally devised for the increase of said fund. The moneys standing to the credit of the retirement fund on the thirty-first of December, nineteen hundred and four, after subtracting therefrom any amounts forfeited, deducted, reserved or withheld from salaries for absences prior to that date, which may, on excuse of absence, be refunded after that date, all excise moneys of nineteen hundred and four which may have been credited to said fund on or before

that date, and all interest for nineteen hundred and four on said fund, which may have been credited to said fund on or before said date, shall be set apart by the comptroller as a permanent fund. The unexpended balances of the income of the teachers' retirement fund for the year nineteen hundred and five, and for all subsequent years shall be added to the said permanent fund. The comptroller shall invest the said permanent fund, and the income thereof may be used for the payment of annuities, but if necessary, in order to carry out the provisions of this act, the board of education may use any portion of the permanent fund in excess of eight hundred thousand dollars in the same manner as the income thereof. The president of the board of education, the chairman of the committee on elementary schools of said board, the chairman of the committee on high schools of said board, the city superintendent of schools, and three members to be selected from the principals, assistants to principals and teachers of the public day schools shall constitute a board of retirement. The three last-named members shall be chosen as follows: On the second Thursday of May in each year the principals, assistants to principals and teachers in each district shall meet at the call of the district superintendent, which call he shall issue at least one week before said meeting, and at a place within the district designated by him, to select by ballot one of their number as district representative to serve for one year. At the close of said meeting, the presiding officer shall transmit to the secretary of the board of education the name and address of the district representative so chosen. The district representatives shall meet at four o'clock in the afternoon on the third Thursday of May at the hall of the board of education and choose by ballot one of their number to serve on the board of retirement for three years from the first day of the following June. At the first meeting of the district representatives after this law takes effect, they shall choose by ballot three of their number to serve on the board of retirement, and the three so chosen shall by lot fix and determine their terms of office as one, two, and three years respectively. Should a vacancy occur among the members of the board of retirement so chosen, the district representatives shall meet and choose by ballot one of their number to serve on the board of retirement for the unexpired term. On the recommendation of the board of retirement, said board of education shall have power, by a two-thirds vote of all of its members, to retire any member of the teaching or supervising staff of the public day schools of the city of New York, or of schools or classes maintained in institutions controlled by the department of public charities or by the department of correction who is mentally or physically incapacitated for

the performance of duty, and who has been engaged in the work of teaching or of school or college supervision, or of examination of teachers for licenses, or any two or more of the several kinds of work, for a period aggregating twenty years, fifteen of which shall have been in the public day schools in the city of New York, or in schools or classes maintained in institutions controlled by the department of public charities or by the department of correction. And the board of education may retire from active service any member of the said teaching or supervising staff who shall have attained the age of sixty-five years and shall have been engaged in the work of teaching or school supervision for a period aggregating thirty years. On the recommendation of the board of retirement, the board of education shall have power, by a two-thirds vote of all its members, to retire upon his or her own application any member of the teaching or supervising staff of the public day schools of the city of New York, or of schools or classes maintained in institutions controlled by the department of public charities or by the department of correction who has been engaged in the work of teaching or of school or college supervision, or of examination of teachers for licenses, or any two or more of these several kinds of work, for a period aggregating thirty years, fifteen of which shall have been in any of the said institutions. The said board of education shall also have power, by a two-thirds vote of all its members, and after recommendation to that effect shall have been made by the board of trustees of the normal college stating that the member of the supervising or teaching force is mentally or physically incapacitated for the performance of duty, to retire any member of the teaching or supervising force of the normal college or of the training department of the normal college who shall have been engaged in said normal college or training department or elsewhere in the public school system of the city of New York for ten years and shall have been engaged in the work of teaching or of school or college supervision or of examination of teachers for licenses, or any two or more of said several kinds of work, during a period aggregating twenty years. The said board of education, upon the recommendation of the trustees of the normal college may also, in its discretion retire any member of the teaching or supervising force upon his or her own application who shall have been engaged in the work of teaching or school or college supervision or examination of teachers for licenses, or any two or more such occupations, for a period aggregating thirty years. Upon such retirement, whether voluntary or otherwise, the person retired shall be entitled to receive an annuity out of the teachers' retirement fund of not less than one-half of the annual salary paid to such

person at the period of retirement, and in case of the president or of a professor to such an additional sum per annum as will increase such one-half of the salary previously paid if not an even multiple of one thousand dollars to an even multiple of one thousand dollars. Any person retired under the provisions of this act after thirty years of service, except as hereinbefore in this section provided in the case of the president or of a professor of the normal college, shall receive as an annuity one-half the annual salary paid to said person at the date of said retirement, not to exceed, however, in the case of a teacher or principal, the sum of fifteen hundred dollars per annum, and in the case of a supervising official, two thousand dollars per annum. And in no case shall the annuity of any person already retired or hereafter to be retired after thirty years of service, be less than six hundred dollars. Any person retired after twenty years of service, but with less than thirty years of service, shall receive an annuity which bears the same ratio to the annuity provided for on retirement after thirty years of service as the total number of years of service of said person bears to thirty years. The annuities provided for by this act shall be payable in monthly installments. All retirements made under the provisions of this act shall take effect either on the first day of February or on the first day of September. The number of persons retired in any one year shall be so limited that the entire amount of the annuities to be paid for that year shall not be in excess of the estimated amount of the retirement fund applicable to the payment of annuities for that year. The words "teaching and supervising staff of the public day schools of the city of New York" as used in this section, shall include the city superintendent of schools, the associate city superintendents, the district superintendents, the members of the board of examiners, directors and assistant directors of special branches, the supervisor and assistant supervisor of lectures, all principals, vice-principals, assistants to principals, heads of departments, and all regular and special teachers of the public day schools of the city of New York. Nothing in this act shall be construed as prohibiting the reappointment to active service, on his or her own application, of any person who has been retired under the provisions of this act. Upon the reappointment of any such person the payment of the annuity of said person shall be discontinued. Teachers hereafter appointed in schools or classes maintained in the institutions controlled by the department of public charities or by the department of correction, shall be appointed by the commissioner of the appropriate department upon the nomination of the city superintendent of schools and shall be licensed by the board of examiners of the department of

education. The department of education through such representatives as it may designate shall maintain an effective visitation and inspection of all such schools and classes. (*As amended by L. 1907, ch. 167.*)

A teacher in the public schools who received and accepted a salary which was less than that attached to the grade she had been employed to teach until she was retired under this section upon a pension based upon one-half of the salary she had received, *held* not to have waived her right to a pension based upon one-half the salary attached to the grade and that she could maintain an action to recover the difference between the pension as fixed and that to which she was entitled under this section. *Moore v. Board of Education*, 121 App. Div. 862, 106 N. Y. Supp. 983.

Public school teachers' retirement fund; appropriation for clerical expenses of administration. (New.)

§ 1092b. On the recommendation of the board of retirement, the board of education shall have power, in its discretion, to authorize the expenditure from the public school teachers' retirement fund of a sum not exceeding fifteen hundred dollars in any one year for clerical and other expenses in connection with the administration of said fund, payments therefrom to be made on vouchers prepared and audited in the same manner as payments from other funds under the jurisdiction of the board of education. (*Added by L. 1909, ch. 505.*)

§ 1093. Charges against principal and teachers and others; proceedings therein. (See 3d Ed., p. 796.)

See cases cited under § 1101, *post*.

§ 1101. Continuation in office of all employees under the public school system. (See 3d Ed., p. 800.)

Grounds for removal.

The board of education has the power to reduce as well as increase the salary attached to a grade and reduction of the salary of a grade to the minimum prescribed by § 1091, *ante*, by the board does not constitute a removal. *Buckbee v. Board of Education*, 115 App. Div. 366, 100 N. Y. Supp. 943 (which reversed 51 Misc. 295, 100 N. Y. Supp. 1063), *aff'd* 187 N. Y. 544.

A teacher in the public schools who resigned upon her marriage in conformity with a by-law of the board of education, providing that the marriage of a female teacher shall vacate her position, cannot contend that the resigna-

tion was induced by duress, although the by-law is subsequently declared to be invalid by the courts. *Matter of Grendon*, 114 App. Div. 759, 100 N. Y. Supp. 253.

The board of education may dispense with the services of a teacher or any of its clerical force if they are unnecessary, without the preferment of charges against the person filling such position or without passing a resolution formally abolishing the position. *People ex rel. Connolly v. Board of Education*, 114 App. Div. 1, 99 N. Y. Supp. 737.

Fines.

A janitor of a public school is an employee of the board of education within the meaning of this section, which confers upon the board the same powers in dealing with such employee as it possesses in the case of a trial of a teacher or principal under § 1093, *ante*. The latter section specifically authorizes the imposition of punishment upon the delinquent and prescribes its nature. Accordingly, *held*, that the board is authorized to inflict a fine upon a janitor for the violation by him of its by-laws. *Farrell v. Board of Education*, 67 Misc. 187, 122 N. Y. Supp. 289.

Discrimination between male and female teachers.

See *Fitzpatrick v. Board of Education*, digested under § 1089, *ante*.

Remedies for wrongful removal.

A school teacher who has been wrongfully transferred from a higher to a lower grade of employment cannot recover the salary attached to the higher grade unless she has sought and obtained reinstatement to the position from which she had been removed in a direct proceeding brought for that purpose. Her right to the former position cannot be tried in an action for salary. *Thompson v. Board of Education*, 201 N. Y. 457, *aff'g* 136 App. Div. 721, 121 N. Y. Supp. 491.

Mandamus will not lie to compel the reinstatement of a member of the department who has been guilty of laches in instituting the proceeding. What constitutes laches stated. *People ex rel. Connolly v. Board of Education*, 114 App. Div. 1, 99 N. Y. Supp. 737; *Matter of Grendon*, 114 App. Div. 759, 100 N. Y. Supp. 253.

Where a teacher claims more salary than that received, his proper remedy is by an action at law. A writ of mandamus to the superintendent of schools to certify the teacher and the board of education to rate and pay him as a teacher of the grade to which he claims to be entitled, will be refused, as mandamus will issue only when the relator is clearly entitled to the relief sought. *People ex rel. Dutton v. Maxwell*, 137 App. Div. 737, 122 N. Y. Supp. 637.

That a member of the clerical force of the department cannot recover his salary for the period he was under suspension pending the trial of charges

upon which he was removed, see *People ex rel. Curren v. Cook*, digested under § 1067, *ante*.

That the reassignment of a teacher temporarily designated to a higher grade does not constitute a removal see cases cited under § 1091, *ante*.

The rate of compensation of teachers in the public schools does not rest upon contract but is fixed by law, and therefore the acceptance by a school teacher of a less sum than that attached to the grade she has been employed to teach does not operate as a waiver of the salary to which she is entitled under the statute. *Moore v. Board of Education*, 121 App. Div. 862, 106 N. Y. Supp. 983. But compare *Brown v. Same*, 70 Misc. 399, 128 N. Y. Supp. 16; *Sarecky v. Same*, 67 Misc. 284, 124 N. Y. Supp. 913; *Du Moulin v. Same*, 124 N. Y. Supp. 901.

Although the principal of a public school can only be removed or reassigned in the manner and for the cause provided in the statute, she may nevertheless waive her right to a position as principal, by demanding and drawing her pay and receipting in full after a reassignment to a lower position in which she received higher pay. *Sheehan v. Board of Education*, 120 App. Div. 557, 104 N. Y. Supp. 1002.

Brooklyn "Grade A" licenses.

This section is not unconstitutional in arbitrarily discriminating between the holders of "Grade A" licenses issued prior to February 1, 1898, and holders of such licenses issued between February 1, 1898, and April 22, 1901. *Fitzpatrick v. Board of Education*, 67 Misc. 564, 124 N. Y. Supp. 765.

A teacher of the former city of Brooklyn holding a "Grade A" license "to teach a common school in said city as a teacher of latin and geometry in Manual Training High School" which was the highest certificate granted to teachers in high schools by the old city of Brooklyn, *held* not entitled to be placed upon the eligible list for the position of head of department in the absence of proof of a by-law of the board of education of Brooklyn making the holder of such a certificate eligible to appointment as head of department. *Hazen v. Board of Education*, 127 App. Div. 235, 111 N. Y. Supp. 337.

Teachers of outlying districts consolidated.

The provisions of this section making the positions of teachers permanent, subject to the limitations therein mentioned, were not applicable to a teacher in the Village of Flushing, whose license was for a period expiring within the current year, except for a period limited by the expiration of his license. *Wood v. Board of Education*, 59 Misc. 605, 112 N. Y. Supp. 578.

§ 1127. The college of The City of New York; continues as a separate corporation. (See 3d Ed., p. 803.)

The College of The City of New York although part of the educational system of the city is a domestic corporation separate and distinct from the

city. Accordingly, the city is not liable for commission of a real estate broker in procuring the new site for the college especially where the trustees of the college have rejected the claim. The remedy of the broker if any is by action against the college. *Fidelity & Deposit Co. v. City of New York*, 108 App. Div. 263, 95 N. Y. Supp. 752.

§ 1168. Authority; duties and powers of the board of health.
(See 3d Ed., p. 819.)

Powers of board of health.

The enforcement of all laws applicable to the care, promotion, or protection of health in the city of New York is vested exclusively in the department of health. Accordingly, the public service commission has no power to abate a nuisance affecting the public health, although the same is created and maintained by a railroad company. *People ex rel. N. Y. etc., R. R. Co. v. Willcox*, 200 N. Y. 423, rev'g 138 App. Div. 330, 123 N. Y. Supp. 153.

City not liable for acts.

The board of health is not the agent of the city in abating a public nuisance and the city is not liable for its acts. *Prime v. City of Yonkers*, 192 N. Y. 105, rev'g 116 App. Div. 699, 102 N. Y. Supp. 118.

Board of health; powers of removal to hospitals of persons sick with contagious diseases. (See 3d Ed., p. 821.)

§ 1170. Said board may remove or cause to be removed to a proper place designated by it, any person sick with a contagious, pestilential or infectious disease and designate, provide and pay for the use of places for such persons. The board may erect, establish, maintain and furnish in such places within the city as are now used or may hereafter be designated by the board of estimate and apportionment for such purposes, buildings and hospitals for the care and treatment of persons sick with contagious diseases, and shall have exclusive charge and control of all municipal hospitals for the treatment of Asiatic cholera, plague, typhus fever, scarlet fever, yellow fever, measles, diphtheria and smallpox, but this shall not be construed to require the board of health to remove any person suffering from any of these diseases to the hospital therefor, unless in its judgment such removal is necessary for the protection of the public health. With the concurrence in writing of the department or departments thereby affected, the board of health shall, from time to time, subject to the approval of the board of estimate and apportionment, designate such hospitals established for or actually caring for persons suffering from a pestilential, contagious or infectious disease, as in its judgment, should, in the public interest and for the protection of the public health, be under the exclusive charge

and control of the said board of health, and all hospitals so designated maintained by any municipal department or departments, together with the employees of such hospitals, shall upon such designation by the board of health and approval of the board of estimate and apportionment, granted after a public hearing, be transferred to the board of health and the control and maintenance thereof shall thereafter be vested in the board of health; provided, however, that the said board of health, with the concurrence in writing of the department or departments thereby affected, may from time to time designate a hospital for the treatment of an infectious disease, other than Asiatic cholera, plague, typhus fever, scarlet fever, yellow fever, measles, diphtheria and smallpox, under the jurisdiction of the board of health, as one which may, without danger to the public health, be transferred to the jurisdiction of other municipal authorities authorized by law to establish or maintain public hospitals, and such designation, if approved by the board of estimate and apportionment, after a public hearing, shall take effect, and the hospital so designated, together with the employees of such hospital, shall thereupon be transferred to such other municipal authorities as are designated, and the duty of maintaining such hospitals shall thereupon vest in such other municipal authorities. Any municipal authority or hospital corporation maintaining a hospital or ward for the treatment of persons having a contagious or infectious disease may admit to such hospital or ward any person applying for admission thereto, and certified by the physicians of the said hospital to have the disease for which the said hospital or ward is maintained, and each such admission shall be reported immediately by such municipal authorities or hospital corporations to the board of health. The discharge of such person shall also be reported forthwith to the board of health. For the purposes of this section, a pestilential, contagious or infectious disease shall be one declared to be such by the board of health. The board of health shall have power to take possession of, and occupy for temporary hospitals, any building or buildings in the said city, during the prevalence of an epidemic, if in the judgment of the board the same may be required, and shall pay for private property so taken a just compensation for the same. Said board may cause proper care and attendance to be given to persons sick or removed, when it shall be made to appear to the said board that any such person is so poor as to be unable to procure for himself such care and attendance, or that the public health requires special medical care and attendance. The board of health may send to such place as it may direct, all aliens and other persons in the city, not residents thereof, who shall be sick of any infectious, pestilential,

or contagious disease. The expense of the support of such aliens or other persons shall be defrayed by the corporation of the city of New York, unless such aliens or other persons shall be entitled to support from the commissioners of emigration. No person shall remove any person sick with infectious, contagious or pestilential disease from any vessel or other place in said city without a written permit from the board of health. (*As amended by L. 1909, ch. 342.*)

§ 1172. Sanitary Code. (See 3d Ed., p. 822.)

Judicial notice of Sanitary Code.

The ratification by the legislature of the existing Sanitary Code permits the court to take judicial notice of its provisions in force at the time of the enactment of this section and the burden of showing any change in the provisions of the Sanitary Code after its adoption by the legislature is upon the party relying thereon. *Cohen v. Department of Health*, 61 Misc. 124, 113 N. Y. Supp. 88.

Sale of milk.

Licenses to sell milk issued by the Department of Health, may be revoked when the licensee has been found guilty of selling adulterated and unwholesome milk in violation of the Sanitary Code. *Met. Milk & Cream Co. v. City of New York*, 113 App. Div. 377, 98 N. Y. Supp. 894, *aff'd* 186 N. Y. 533; *People ex rel. Lodes v. Department of Health*, 189 N. Y. 187, *rev'g* 117 App. Div. 856, 103 N. Y. Supp. 275.

The board of health has the power to revoke a license to sell milk without notice or a hearing to the licensee. *People ex rel. Lodes v. Board of Health*, 189 N. Y. 187, *rev'g* 117 App. Div. 856, 103 N. Y. Supp. 275.

The board of health has power to revoke permits to sell milk although no ordinance has been adopted by the board authorizing such revocation. *People ex rel. Lodes v. Department of Health*, 189 N. Y. 187, *rev'g* 117 App. Div. 856, 103 N. Y. Supp. 275.

Where, as a matter of fact, the public health is not imperiled by the manner in which one carries on the business of selling milk, the summary action of the board of health in preventing the owner of such business from carrying it on, cannot make it so; and interference by the board with such business subjects its members to the same perils and liabilities as an individual who interferes with a lawful business. *People ex rel. Lodes v. Dept. of Health*, 51 Misc. 190, 100 N. Y. Supp. 788, *aff'd* on opinion below 116 App. Div. 890, 102 N. Y. Supp. 1145.

The action of the board of health in revoking a license to sell milk is not reviewable by certiorari or appeal. If such revocation is unreasonable or arbitrary, the appropriate remedy is alternative mandamus. *People ex rel.*

Lodes v. Department of Health, 189 N. Y. 187, rev'g 117 App. Div. 865, 103 N. Y. Supp. 275. *Id.*, 51 Misc. 190, 110 N. Y. Supp. 788, aff'd on opinion below, 116 App. Div. 890, 102 N. Y. Supp. 1145.

Unwholesome eggs.

Absence of knowledge or criminal instinct is no defense to a prosecution for a violation of § 42 of the Sanitary Code providing that unwholesome eggs shall not be stored or kept within the city. *People v. Friedman*, 138 App. Div. 29, 122 N. Y. Supp. 500, aff'd 200 N. Y. 591.

It seems that the mere temporary possession of unwholesome eggs does not constitute a violation of § 42 of the Sanitary Code providing that eggs that are unwholesome or unsafe from food should not be brought into the city or offered for sale or stored therein. *People v. Friedman*, 138 App. Div. 29, 122 N. Y. Supp. 500, aff'd 200 N. Y. 591.

Adulterated confectionery.

Section 68 of the Sanitary Code prohibiting the sale of adulterated confectionery is not confined to persons selling candy at retail but is applicable as well to a "jobber" selling confectionery to the retailer. *People v. Greenberg*, 134 App. Div. 599, 119 N. Y. Supp. 325.

It is no defense to a prosecution against a jobber of confectionery for violating § 68 of the Sanitary Code, prohibiting the sale of adulterated confectionery, that the jobber purchased the candies from a manufacturer without knowledge that they were adulterated. *People v. Greenberg*, 134 App. Div. 599, 119 N. Y. Supp. 325.

Live poultry.

The court will not enjoin the department of health from enforcing the provisions of the Sanitary Code, so *held*, holding that an applicant for permit to keep, sell and slaughter live poultry on his premises who had complied with all the provisions of § 79 of the Sanitary Code, was not entitled to an injunction restraining the board of health from enforcing the provisions of that section on the ground that it has unreasonably refused to issue to him the special permit required as a condition of carrying on the business of selling and slaughtering live poultry. If the action of the board of health in refusing to grant such permit was arbitrary, tyrannical or unreasonable, the appropriate remedy would be by an alternative writ of mandamus compelling the issuance of the permit. *Cohen v. Department of Health*, 61 Misc. 124, 113 N. Y. Supp. 88.

Smoke ordinance.

Section 86 of the Sanitary Code which prohibits any person from causing or allowing smoke cinders, etc., to be discharged from any building to the detriment or annoyance of any person not being therein, contemplates that the escape of smoke shall be in fact a nuisance, not perhaps within the full

scope of a common law nuisance, but a nuisance which by annoying one or more persons shall be constructively a public nuisance. The mere exuding of smoke does not create a liability under this section. Accordingly where the evidence shows that a furnace had been equipped with the best smoke consumers then known and that the smoke which actually issued from the building was innocuous and had not been to the detriment or annoyance of any person, no liability attaches. *People v. Sturgis*, 121 App. Div. 407, 106 N. Y. Supp. 61.

Section 86 of the Sanitary Code known as the smoke ordinance, providing that furnaces shall be so constructed as to consume smoke, places the duty of equipping furnaces with smoke consumers upon the owner of the factory, and a superintendent of the factory cannot be held liable to the penalties prescribed for violation of the ordinance, because of the failure of his master to equip a furnace with smoke consumers. *People v. Sturgis*, 121 App. Div. 407, 106 N. Y. Supp. 61.

Registration of physicians.

A person duly licensed to practice osteopathy is a physician within the meaning of that term as employed in the Sanitary Code, and he can compel the department of health to register him in the list of physicians of the city and to accept death certificates from him with a like effect as from other physicians. *Matter of Bandel v. Department of Health*, 193 N. Y. 133, aff'g 127 App. Div. 382, 111 N. Y. Supp. 431.

§ 1173. Judicial notice of seal and presumptions. (See 3d Ed., p. 825.)

Acts of board presumptively valid.

The provisions of this section that the acts of the board of health shall be "regarded as in their nature judicial" was not intended to change the character of the board from administrative to judicial officers, but was simply intended to create a presumption that their acts were legal. *People ex rel. Lodes v. Department of Health*, 189 N. Y. 187, rev'g 117 App. Div. 856, 103 N. Y. Supp. 275.

§ 1174. Seal. (See 3d Ed., p. 825.)

Delegation of powers.

The board of health has power under this section to authorize the commissioner of health to act for it in making a contract with an architect for the preparation of plans and specifications for the erection of a health kitchen, and a contract so made by the latter in conformity with the power delegated to him, will bind the city. It is not necessary to the validity of the contract that it be reduced to writing or let upon competitive bidding. *Bernstein v. City of New York*, 134 App. Div. 226, 118 N. Y. Supp. 903.

§ 1175. Publication of reports and statistics. (See 3d Ed., p. 825.)

Inspection of records by tax payer.

A tax payer is not entitled under § 1545, *post*, to a general inspection of the records of the health department unless he shows that he has some legitimate interest in the records, or is inspired by a commendable motive in seeking the inspection. In *re Allen*, 131 N. Y. Supp. 1027.

§ 1176. Proceedings relative to dangerous buildings, vessels, places and things. (See 3d Ed., p. 825.)

The order of the health authorities declaring a business to be a nuisance is a legislative act, and not subject to review on certiorari. *People ex rel. Lodes v. Department of Health*, 189 N. Y. 187, rev'g 117 App. Div. 856, 103 N. Y. Supp. 275.

§ 1205. Removal of night soil and offal; contracts for. (See 3d Ed., p. 842.)

The board of health is not controlled in the awarding of contracts for the removal of refuse by the provisions of § 419, *ante*. The board is vested with the discretionary powers in awarding such contracts by this section, and in the absence of fraud and deception, the court has no right to interfere with the action of the board. *Van Iderstine v. Department of Health*, 65 Misc. 608, 122 N. Y. Supp. 468.

Registration of births not previously recorded. (See 3d Ed., p. 857.)

§ 1241. The births of the children of actual residents of the city of New York, which may have occurred during the temporary absence of the parents of such children from the city of New York, and the births of children which failed to be recorded through the neglect of the physician or other medical attendant present at such birth, may be recorded in the bureau of records of the health department of said city, in a special book, to be kept for such purpose, upon the application in such behalf by the parents or guardians of such children. Such application shall be made to the commissioner of health, and shall be accompanied by a certificate of the physician or midwife attending professionally at such birth, and personally cognizant thereof, together with the affidavit of at least two citizens, certifying to their knowledge of the facts, and that the physician or midwife making such certificate of birth is a reputable person in good standing in the community in which he or she may reside. If the physician or midwife, as the case may be, who attended professionally

at any such birth is dead or cannot be found after due diligence, the application to record such delayed birth certificate shall, in addition to the affidavits above mentioned, be accompanied by a certificate signed by the father, mother or guardian upon a form prescribed by the said department of health. Such application and papers to record any such birth must also state in detail the efforts made to locate any such physician or midwife who cannot, as aforesaid, be found after due diligence or be accompanied by proof of death when such fact is known to the applicant. The application must be made within ten years from the date of birth, and no such birth shall be recorded without proof satisfactory to and upon the approval of the commissioner of health of all the facts and circumstances required to be stated in the application and papers mentioned herein. No change or alteration shall, at any time, be made in any of the records of the said bureau of records in said city, without proof satisfactory to and upon the approval of the said commissioner of health. Transcripts of any record in said bureau of records may be given, in the discretion of the department of health, to a parent or the next of kin of any person authorized to apply for the same, but no transcripts of false or fraudulent returns made to the said bureau, nor of the entries thereof, shall be given; and they shall be canceled upon due proof of the facts to the department of health. Transcripts of these records when required shall be on such forms as the commissioner of health may prescribe, and for them the usual fees for copies of records may be received. (*As amended by L. 1911, ch. 886.*)

The commissioner has no power under this section to enter the record of a birth unless the application is accompanied by the certificate of the physician or midwife attending professionally at such birth. While the section is to be liberally construed as a remedial statute, a construction which would permit the substitution of other proof for the certificate of the attending physician or midwife would involve a disregard of its mandatory provision. *Sp. T., Bischoff, J., Matter of Speziale v. Lederle, N. Y. Law Jour., November 26th, 1910.*

Mandamus will lie to compel the department of health to correct its record so as to state the true name of a child where the attending physician certified a name given him by the mother in answer to his question, the purpose of which she was ignorant and the parents before the christening adopted by mutual consent another name for the child. *People ex rel. Baker v. Department of Health, 131 App. Div. 693, 116 N. Y. Supp. 66.*

§ 1265. Arrests for violation of rules; upon complaint of magistrates, trial, fines, etc. (See 3d Ed., p. 865.)

Repealed by Inferior Criminal Court Act, L. 1910, ch. 659, § 120.

What moneys shall be included in pension fund of health department. (See 3d Ed., p. 894.)

§ 1320. The health department pension fund shall consist of:

1. All moneys collected from fines and penalties for violations of the sanitary code or health laws in the city of New York.

2. A sum of money equal to but not greater than one per centum of the monthly pay, salary or compensation of each physician or employee of the health department, which sum shall be deducted monthly by the comptroller from the pay, salary or compensation of each physician or employee of the health department, and the said comptroller is hereby authorized, empowered and directed to deduct said sum of money as aforesaid, and forthwith to pay the same to the chairman of the board of trustees of the health department pension fund. And no physician or employee shall be entitled to the provisions of the said pension fund unless he immediately files with the board of health and the said comptroller a notice that he intends to take advantage of said pension law, and a consent that such deduction as aforesaid shall be made; and any physician or employee hereafter entering the service of the said department of health shall within six months thereafter file such notice and consent or he shall not be entitled to the benefits of any of the provisions of this act.

3. All said moneys, including the fines and penalties directed in section twelve hundred and twenty-two of this act, to be paid to the comptroller shall, within thirty days after collection of payment, be paid over by the department, officers, clerks, magistrates and courts receiving and collecting the same to the said board of trustees of the health department pension fund. (*As amended by L. 1907, ch. 373.*)

Health department pension fund; personal representatives of physician or employee when entitled to. (See 3d Ed., p. 894.)

§ 1322. Whenever such physician or employee shall die while in the service of the health department from disease contracted, or injury sustained by him as a consequence of the actual performance of his duties, without any fault or misconduct on his part, leaving a widow, or a dependent widowed mother, the said board of trustees of said pension fund may grant, award or pay to the widow or dependent widowed mother, as the case may be, of said physician or employee, the sum of three hundred dollars annually during her life, so long as she remains a widow; and if there be no widow of any such physician or employee, but he shall leave minor children under

eighteen surviving him, then said three hundred dollars may be given, awarded and paid to said children under eighteen years of age. (*As amended by L. 1907, ch. 644.*)

Pension for twenty years' service in health department. (See 3d Ed., p. 895.)

§ 1323a. Any physician or employee who has or shall have performed duty as such physician or employee in any department of health in the city of New York, for a period of twenty years, or upward, upon his own application, in writing, or upon a certificate and report of a board of physicians, appointed by the board of health, certifying that such physician or employee is permanently disabled, so as to be unfit for further duty as such physician or employee, shall be retired from active service by resolution of the board of health of the health department of the city of New York, and placed upon the health department pension roll, and thereupon shall be awarded, granted and paid from said health department pension fund by the trustees thereof, an annual sum during his lifetime not exceeding one-half the ordinary full pay of a physician or employee in the health department service, of the rank of the physician or employee so retired. Pensions granted under this section shall be for the natural life of the person receiving the same, and shall not be revoked, repealed or diminished. In determining the term of service of any such physician or employee, under this section, service in former health departments or board of health having jurisdiction in matters of public health in any part of the city of New York, as constituted by this act, shall be counted and held to be service in the department of health of the city of New York. (*As amended by L. 1907, ch. 373.*)

§ 1329. Officers and employees. (See 3d Ed., p. 898.)

The rule of the tenement house department that, in case of the sickness of an employee, notice must be sent at once to that department in writing and a doctor's certificate must be furnished to the effect that the employee is physically unable to perform his duties, does not require that the doctor's certificate be furnished at once; and, where notice is given at once and the doctor's certificate is mailed within three days after the beginning of the employee's illness, the certificate is in time. *People ex rel. Holahan v. Butler*, 63 Misc. 360, 118 N. Y. Supp. 459.

The tenement house commissioner has the power under this section to suspend an employee of the department pending the determination of charges against him, and where his dismissal from office is justified he cannot recover

his salary during the period of suspension. *People ex rel. O'Brien v. Butler*, 120 App. Div. 751, 105 N. Y. Supp. 631. See *O'Brien v. City of New York*, 57 Misc. 639, 108 N. Y. Supp. 611.

The tenement house commissioner has no authority to audit or pay the salary of an employee of his department, since under the charter that power is vested in the finance department and therefore the commissioner cannot be compelled by mandamus to act upon a claim for salary alleged to be due to an employee of the department. *People ex rel. O'Brien v. Butler*, 120 App. Div. 751, 105 N. Y. Supp. 631.

§ 1344i. Records in department. (See 3d Ed., p. 908.)

The foreclosure of a mortgage upon lands extinguishes the lien given by statute for violation of the tenement house act and neither the purchaser on the foreclosure sale nor his grantee is entitled to have the public record of the violation or a note placed on the record stating that the violation was cancelled and dismissed. *People ex rel. Gordon v. Butler*, 135 App. Div. 222, 120 N. Y. Supp. 302.

§ 1351. Municipal court created. (See 3d Ed., p. 913.)

Under the express provisions of this section the Municipal Court of the city of New York is a court not of record. *Taylor v. Bell*, 121 App. Div. 437, 106 N. Y. Supp. 273.

Municipal courts; justices. (See 3d Ed., p. 914.)

§ 1352. The said court shall be held by justices to be elected or appointed, as follows:

1. The justices of the municipal court in office on the first day of January, nineteen hundred and eight, shall continue to hold office for the remainder of the terms for which they were elected or appointed, and shall continue as justices of the municipal court of the city of New York for the districts by this act territorially changed and altered, as follows, respectively:

The justice for the first district of the borough of Manhattan as heretofore constituted shall be a justice for the first district of the borough of Manhattan as constituted by this act.

The justice for the second district of the borough of Manhattan as heretofore constituted shall be a justice for the first district of the borough of Manhattan as constituted by this act.

The justice for the third district of the borough of Manhattan as heretofore constituted shall be a justice for the first district of the borough of Manhattan as constituted by this act.

The justice for the fourth district of the borough of Manhattan as heretofore constituted shall be a justice for the second district of the borough of Manhattan as constituted by this act.

The justice for the fifth district of the borough of Manhattan as heretofore constituted shall be a justice for the second district of the borough of Manhattan as constituted by this act.

The justice for the sixth district of the borough of Manhattan as heretofore constituted shall be a justice for the fourth district of the borough of Manhattan as constituted by this act.

The justice for the seventh district of the borough of Manhattan as heretofore constituted shall be a justice for the sixth district of the borough of Manhattan as constituted by this act.

The justice for the eighth district of the borough of Manhattan as heretofore constituted shall be a justice for the third district of the borough of Manhattan as constituted by this act.

The justice for the ninth district of the borough of Manhattan as heretofore constituted shall be a justice for the eighth district of the borough of Manhattan as constituted by this act.

The justice for the tenth district of the borough of Manhattan as heretofore constituted shall be a justice for the third district of the borough of Manhattan as constituted by this act.

The justice for the eleventh district of the borough of Manhattan as heretofore constituted shall be a justice for the seventh district of the borough of Manhattan as constituted by this act.

The justice for the twelfth district of the borough of Manhattan as heretofore constituted shall be a justice for the fifth district of the borough of Manhattan as constituted by this act.

The justice for the thirteenth district of the borough of Manhattan as heretofore constituted shall be a justice for the second district of the borough of Manhattan as constituted by this act.

The justice for the fourteenth district of the borough of Manhattan as heretofore constituted shall be a justice for the ninth district of the borough of Manhattan as constituted by this act.

The justices in the boroughs of the Bronx, Brooklyn, Queens and Richmond shall continue as justices in the districts for which they were respectively elected or appointed.

2. At the general election to be held in the year nineteen hundred and seven, there shall be elected fifteen additional justices of the municipal court of the city of New York as follows, to wit:

One additional justice for the second district of the borough of Manhattan, as hereby constituted.

One additional justice for the fourth district of the borough of Manhattan, as hereby constituted.

One additional justice for the sixth district of the borough of Manhattan, as hereby constituted.

Two additional justices for the fifth district of the borough of Manhattan, as hereby constituted.

Two additional justices for the seventh district of the borough of Manhattan, as hereby constituted.

One additional justice for the eighth district of the borough of Manhattan, as hereby constituted.

Three additional justices for the ninth district of the borough of Manhattan, as hereby constituted.

One additional justice for the second district of the borough of Brooklyn, as now constituted; one additional justice for the third district of the borough of Brooklyn as now constituted; one additional justice for the sixth district of the borough of Brooklyn as now constituted; one additional justice for the seventh district of the borough of Brooklyn as now constituted.

The said justices to be elected by the electors of the respective districts for which they are elected.

3. The successors of the justices mentioned in the first and second subdivisions of this section shall be elected by the electors of the districts of the said justices as hereby constituted respectively at the general election to be held in the year at the end of which the terms of said justices respectively shall expire.

4. At any election to be held at the general election in the year one thousand nine hundred and seven under existing provisions of law, to fill a vacancy then existing in the office of justice in any district as heretofore constituted, whether by expiration of term or otherwise, the said vacancy shall be filled by the election of a justice of said court for a full term, for the district as constituted by this act, to which the justice of said district, as heretofore constituted, would, if in office on January first, one thousand nine hundred and eight, be assigned by the provisions of subdivision one of this section, as amended by this act. Such section is also amended by adding thereto a new subdivision to be subdivision five, and to read as follows:

5. There shall be elected at the general election to be held on the first Tuesday succeeding the first Monday of November, in the year nineteen hundred and nine, one municipal court justice in each of the first, second, third and fourth districts of the borough of Queens, to hold office for terms of ten years from and including the first day of January succeeding their election. (*As amended by L. 1907, ch. 603.*)

6. There shall be elected at the general election to be held on

the first Tuesday succeeding the first Monday of November, in the year nineteen hundred and eleven, one additional municipal court justice for the second district of the borough of the Bronx as now constituted, to hold office for the term of ten years from and including the first day of January succeeding his election. The said justice to be elected by the electors of the second district of the borough of the Bronx as now constituted; and the successor of the said justice to be elected by the electors of the second district of the borough of the Bronx as now constituted at the general election to be held in the year at the end of which the term of the said justice shall expire. (*Added by L. 1911, ch. 678.*)

Salary. (See 3d Ed., p. 916.)

§ 1355. The salary of each of said justices, except those appointed or elected from the boroughs of Queens and Richmond, shall be eight thousand dollars a year, to be paid in equal monthly installments by the proper officers of said city, and the salary of each of said justices appointed or elected for the boroughs of Queens and Richmond shall be seven thousand dollars a year, to be paid in the same manner, provided, however, that whenever a justice elected or appointed for the borough of Queens or the borough of Richmond shall hold court in either of the boroughs of Manhattan, Brooklyn or The Bronx, such justice shall receive in addition to such salary the sum of ten dollars for each day on which he shall so hold court, to be paid on the certification of the president of the board of justices that the holding of court by such justice was necessary in consequence of the illness or necessary absence of the justice regularly assigned to hold the same, or on account of extraordinary pressure of business. The comptroller of the city of New York is hereby authorized and directed to issue special revenue bonds under the provisions of section one hundred and eighty-eight of chapter four hundred and sixty-six of the laws of nineteen hundred and one in an amount sufficient to provide for the payment of the salaries of the justices, clerks, deputy clerks, assistant clerks and stenographers during the current fiscal year, and to provide for the payment of the increases made. (*As amended by L. 1907, ch. 603.*)

Vacancies. (See 3d Ed., p. 916.)

NOTE.—The provisions of L. 1907, ch. 603, § 3, amending § 1357 were held unconstitutional in *Matter of Markland v. Scully*, 203 N. Y. 158, aff'g 146 App. Div. 350, and the section as it existed before the amendment must be deemed to be still in force. The section as originally enacted has therefore been incorporated as follows:

§ 1357. Vacancies occurring in the office of justice of said court

shall be filled at the next ensuing general election for the unexpired term commencing on the first day of January next after said election; and the mayor of the city shall appoint some proper person to fill such vacancy in the interim within twenty days after the same occurs.

Borough of Manhattan; districts. (See 3d Ed., p. 917.)

§ 1360. In the borough of Manhattan there shall be nine districts as follows:

1. The first district embraces the territory bounded on the south and west by the southerly and westerly boundaries of the said borough, on the north by the center line of Fourteenth street and the center line of Fifth street from the Bowery to Second avenue, on the east by the center lines of Fourth avenue from Fourteenth street to Fifth street, Second avenue, Chrystie street, Division street and Catharine street.

2. The second district embraces the territory bounded on the south by the center line of Fifth street from the Bowery to Second avenue and on the south and east by the southerly and easterly boundaries of the said borough; on the north by the center line of East Fourteenth street; on the west by the center lines of Fourth avenue from Fourteenth street to Fifth street, Second avenue, Chrystie street, Division street, and Catharine street.

3. The third district embraces the territory bounded on the south by the center line of Fourteenth street; on the east by the center line of Seventh avenue from Fourteenth street to Fifty-ninth street and by the center line of Central Park West from Fifty-ninth street to Sixty-fifth street; on the north by the center line of Sixty-fifth street, and the center line of Fifty-ninth street from Seventh to Eighth avenues; on the west by the westerly boundary of the said borough.

4. The fourth district embraces the territory bounded on the south by the center line of East Fourteenth street; on the west by the center line of Lexington avenue and by the center line of Irving place, including its projection, through Gramercy Park; on the north by the center line of Fifty-ninth street; on the east by the easterly line of said borough; excluding, however, any portion of Blackwell's island.

5. The fifth district embraces the territory bounded on the south by the center line of Sixty-fifth street; on the east by the center line of Central Park West; on the north by the center line of One Hundred and Tenth street; on the west by the westerly boundary of said borough.

6. The sixth district embraces the territory bounded on the south by the center line of Fifty-ninth street, and by the center line of Ninety-sixth street from Lexington avenue to Fifth avenue; on the west by the center line of Lexington avenue from Fifty-ninth street to Ninety-sixth street and the center line of Fifth avenue from Ninety-sixth street to One Hundred and Tenth street; on the north by the center line of One Hundred and Tenth street; on the east by the easterly boundary of said borough including, however, all of Blackwell's island and excluding any portion of Ward's island.

7. The seventh district embraces the territory bounded on the south by the center line of One Hundred and Tenth street; on the east by the center line of Fifth avenue to the northerly terminus thereof, and north of the northerly terminus of Fifth avenue, following in a northerly direction the course of the Harlem river on a line co-terminous with the easterly boundary of said borough; on the north and west by the northerly and westerly boundaries of said borough.

8. The eighth district embraces the territory bounded on the south by the center line of One Hundred and Tenth street; on the west by the center line of Fifth avenue; on the north and east by the northerly and easterly boundaries of said borough, including Randall's island and the whole of Ward's island.

9. The ninth district embraces the territory bounded on the south by the center line of Fourteenth street and by the center line of Fifty-ninth street from the center line of Seventh avenue to the center line of Central Park West; on the east by the center line of Lexington avenue and by the center line of Irving place, including its projection through Gramercy Park and by the center line of Fifth avenue from the center line of Ninety-sixth street to the center line of One Hundred and Tenth street; on the north by the center line of Ninety-sixth street from the center line of Lexington avenue to the center line of Fifth avenue and by One Hundred and Tenth street from Fifth avenue to Central Park West; on the west by the center line of Seventh avenue, and Central Park West. (*As amended by L. 1907, ch. 603.*)

Borough of Queens; four districts for municipal courts.

(See 3d Ed., p. 920.)

§ 1362. In the borough of Queens there shall be four districts as follows:

1. The first district embraces the territory bounded by and within the canal, Rapelye avenue, Jackson avenue, Old Bowery Bay road, Bowery bay, East river and Newtown creek.

2. The second district embraces the territory bounded by and within Maspeth avenue, Maurice avenue, Calamus road, Long Island railroad, Trotting-Course lane, Metropolitan avenue, boundary line between the second and fourth wards, boundary line between the second and third wards, Flushing creek, Ireland Mill road, Lawrence avenue, Bradford avenue, Main street, Lincoln street, Union street, Broadway, Parsons avenue, Lincoln street, Percy street, Sanford avenue, Murray Lane, Bayside avenue, Little Bayside road, Little Neck bay, East river, Bowery bay, Old Bowery Bay road, Jackson avenue, Rapelye avenue, the canal and Newtown creek.

3. The third district embraces the territory bounded by, and within Maspeth avenue, Maurice avenue, Calamus road, Long Island railroad, Trotting-Course lane, Metropolitan avenue, boundary line between the second and fourth wards, Vandever avenue, Jamaica avenue, Shaw avenue, Atlantic avenue, Morris avenue, Rockaway road, boundary line between Queens and Nassau counties, Atlantic ocean, Rockaway inlet, boundary line between Queens and Kings counties and Newtown creek.

4. The fourth district embraces the territory bounded by and within the boundary line between the second and fourth wards, the boundary line between the second and third wards, Flushing creek, Ireland Mill road, Lawrence avenue, Bradford avenue, Main street, Lincoln street, Union street, Broadway, Parsons avenue, Lincoln street, Percy street, Sanford avenue, Murray lane, Bayside avenue, Little Bayside road, Little Neck bay, boundary line between Queens and Nassau counties, Rockaway road, Morris avenue, Atlantic avenue, Shaw avenue, Jamaica avenue, and Vandever avenue. (*As amended by L. 1908, ch. 462.*)

Clerks and assistant clerks. (See 3d Ed., p. 921.)

§ 1373. The clerks and assistant clerks of the municipal court of the city of New York in office on the thirty-first day of December, nineteen hundred and seven, shall continue to hold office for the remainder of the terms for which they were appointed at their present salaries, but in the borough of Manhattan they may be assigned as hereafter provided to the duties of deputy clerks or assistant clerks. The clerk and assistant clerk of each district, as at present constituted, shall, except as otherwise herein provided, be a clerk and if he shall be assistant clerk at the time of the passage of this act he shall become the deputy clerk in the district as hereby constituted to which the justice elected or appointed in the district for which such clerk or assistant clerk was appointed is assigned by the provisions of this act. In any case where, by reason

of the change of districts provided by this act two or more clerks shall, by the preceding provisions of this section, be assigned to any one district as hereby constituted the justices designated as justices for said district by the provisions of subdivision one of section thirteen hundred and fifty-two of the Greater New York charter as hereby amended shall on or before December first, nineteen hundred and seven, designate one of said clerks to be the clerk and another to be the deputy clerk of said court for said district and shall designate the other or others of such clerks to act as assistant clerk or clerks. If the justices in any district or a majority of them shall fail to agree on such designations within said time, then the board of justices shall make such designations. The clerk in each district for which there shall on the first day of January, nineteen hundred and eight, be no clerk, under the provisions hereof, shall be appointed by the justice or justices of the district. The successors of any clerks so appointed or as herein provided, as well as of the clerks in office on the thirty-first day of December, nineteen hundred and seven, shall be appointed in each district by the justice or justices thereof for a term of six years from the date of appointment, and shall receive a salary of three thousand dollars per annum, except in the boroughs of Queens and Richmond, where the salary of such clerks shall be two thousand dollars per annum. If the said justice or a majority of said justices fail to agree upon such appointment within thirty days after the vacancy occurs then the justices in the borough containing such district, or a majority of them shall make such appointment. But no clerk shall be appointed in any district so long as there shall be in such district any clerk who shall have held the office of clerk on the thirty-first day of December, nineteen hundred and seven; in any such case a vacancy occurring in the office of the clerk of such district shall be filled by the designation as clerk of said district of one of the other clerks in said district theretofore acting as deputy clerk under the provisions hereof, which designation shall be made by the justices of said district. The board of estimate and apportionment shall, on the recommendation of the board of justices prescribe the number of assistant clerks, stenographers, interpreters, attendants and other employees of the said court for each borough and shall fix their respective salaries, except as herein specifically provided. Except as herein provided, the clerks, assistant clerks, stenographers, interpreters, attendants and other employees of the said court who shall be in office on the thirty-first day of December, nineteen hundred and seven, shall continue until the expiration of their respective terms in the like capacity and at their present salaries as officers of said municipal court.

Each additional justice elected pursuant to the provisions of this act shall appoint two assistant clerks and one stenographer who shall hold office and draw salary for the same term and at the same rate enjoyed by the assistant clerks and stenographers in the same borough, such stenographer so appointed shall act as the stenographer of the part of the court where the justice appointing him may sit.

The justice or justices or board of justices upon making an appointment to any of the offices in this act provided for shall make duplicate certificates of such appointments stating the term of the appointment and when it will expire, and one of such duplicates shall be filed in the office of the city clerk and the other with the secretary of the board of justices, provided for in the next section. All other assistant clerks, stenographers, interpreters, attendants and other employees of said court shall be appointed in the same manner as the clerks, and the board of justices shall from time to time prescribe their duties and assign them to service in the respective districts within the borough in which is located the district for which they shall have been appointed.

Before entering upon his duties, each clerk, deputy clerk and assistant clerk shall file in the office of the comptroller of the city of New York, a bond in the penal sum of five thousand dollars, conditioned for the faithful discharge of his duty and the due accounting for and payment of all money by him received or with him deposited in any action as such clerk, or deputy clerk, or assistant clerk to be approved by the comptroller to be endorsed thereon. Neither the clerks, deputy clerks nor assistant clerks nor other employees of said courts shall receive any fee or compensation whatever for their own use for any services performed by them by virtue of their offices other than their salaries. No clerk, deputy clerk, assistant clerk, or other employee of such courts shall hold any other office or be interested in any other business except as permitted by the next section, but shall give their whole time to their respective duties and shall reside in the borough in which the district for which they are appointed respectively is situated. For any breach of said bond the appellate division of the supreme court in the judicial department wherein the district for which such clerk, deputy clerk, or assistant clerk is appointed is situated, may order the same to be prosecuted in the name of any person damaged by such breach. The justices of the respective districts or a majority of them if there be more than one, may remove any of the said assistant clerks, attendants, stenographers, or interpreters, provided that before removal such officers shall have notice of the cause of their proposed

removal and an opportunity to make an explanation; and the reasons for any removal shall be briefly entered on such minutes. (*As amended by L. 1907, ch. 603.*)

Appointment of clerks.

The provisions of this section restrict the appointment of clerks to justices holding their office by election and therefore a judge who has been appointed by the mayor to fill a vacancy, has no power to appoint an assistant clerk upon the expiration of the term of the prior incumbent. *People ex rel. Foley v. Unger*, 123 App. Div. 310, 108 N. Y. Supp. 373.

An assistant clerk of the court whose term expires during the time a justice appointed by the mayor is holding office, would hold over, by virtue of the Public Officers Law and § 1558 of the charter, until his successor was appointed. *People ex rel. Foley v. Unger*, 123 App. Div. 310; 108 N. Y. Supp. 373.

Compensation of clerks.

This section as amended by L. 1907, ch. 603, § 6 vests the board of estimate and apportionment with exclusive power to fix the compensation of stenographers of the Municipal Court and the discretion of the board in this respect cannot be controlled by the recommendation of the board of justices. *People ex rel. McDermott v. Board of Estimate*, 72 Misc. 456, 131 N. Y. Supp. 294, aff'd 146 App. Div. 515, 131 N. Y. Supp. 604.

Removal. (See 3d Ed., p. 923.)

§ 1383. The justices of said court and the clerks and deputy clerks thereof may be removed for cause after due notice and an opportunity of being heard by the appellate division of the supreme court in the judicial district wherein the district for which said justices were elected or appointed or wherein the district for which such clerk or deputy clerks were appointed, is situated. (*As amended by L. 1907, ch. 603.*)

§ 1390. Inferior courts of criminal jurisdiction; division of city for such purpose. (See 3d Ed., p. 925.)

Repealed by L. 1910, ch. 659, § 120.

NOTE.—In 1910, the legislature passed an act in relation to the inferior courts of criminal jurisdiction in the city of New York, defining their powers and jurisdiction, and providing for their officers, known as the "Inferior Criminal Courts Act of the City of New York," which was in effect a revision of preceding acts, and repealed this section and the following sections, to § 1419, inclusive, noted.

§ 1391. Board of Magistrates. (See 3d Ed., p. 925.)

Repealed by L. 1910, ch. 659, § 120.

§ 1392. City Magistrates. (See 3d Ed., p. 925.)

Repealed by L. 1910, ch. 659, § 120.

§ 1393. Organization and powers of the boards. (See 3d Ed., p. 928.)

Repealed by L. 1910, ch. 659, § 120.

§ 1394. Police clerks. (See 3d Ed., p. 929.)

Repealed by L. 1910, ch. 659, § 120.

§ 1395. Bond of police clerks. (See 3d Ed., p. 930.)

Repealed by L. 1910, ch. 659, § 120.

§ 1396. Other appointees. (See 3d Ed., p. 930.)

Repealed by L. 1910, ch. 659, § 120.

§ 1396a. Clerks and employees in second division. (See 3d Ed., p. 930.)

Repealed by L. 1910, ch. 659, § 120.

§ 1397. Authority to adopt rules. (See 3d Ed., p. 931.)

Repealed by L. 1910, ch. 659, § 120.

Night session of magistrates' courts. (New.)

§ 1397a. After the number of magistrates in the first division shall have been increased to sixteen, by appointment of the mayor pursuant to law, the board of city magistrates of the first division shall provide for the holding of a night session of the court to be held in such place and during such hours of each night as the board may direct and shall make assignments of magistrates to hold the same. (*Added by L. 1907, ch. 598.*)

See Inferior Criminal Court Act, L. 1910, ch. 659, § 71.

§ 1398. Maintenance of order in courts. (See 3d Ed., p. 932.)

Repealed by L. 1910, ch. 659, § 120.

§ 1399. Establishment of part for children's cases in first division. (See 3d Ed., p. 932.)

Repealed by L. 1910, ch. 659, § 120.

§ 1400. Court records. (See 3d Ed., p. 933.)

Repealed by L. 1910, ch. 659, § 120.

§ 1401. Qualification of city magistrates. (See 3d Ed., p. 934.)

Repealed by L. 1910, ch. 659, § 120.

§ 1401a. Removals. (See 3d Ed., p. 934.)

Repealed by L. 1910, ch. 659, § 103.

§ 1402. Salaries of city magistrates. (See 3d Ed., p. 934.)

Repealed by L. 1910, ch. 659, § 120.

§ 1403. Inability of magistrate to act; transfer of charges.
(See 3d Ed., p. 935.)

Repealed by L. 1910, ch. 659, § 120.

§ 1404. Appeals from city magistrates. (See 3d Ed., p. 935.)

Repealed by L. 1910, ch. 659, § 120.

§ 1405. Special sessions continued. (See 3d Ed., p. 936.)

Repealed by L. 1910, ch. 659, § 120.

§ 1406. Vacancies. (See 3d Ed., p. 936.)

Repealed by L. 1910, ch. 659, § 120.

§ 1407. Clerks. (See 3d Ed., p. 936.)

Repealed by L. 1910, ch. 659, § 120.

§ 1408. Court of special sessions, now held. (See 3d Ed., p. 937.)

Repealed by L. 1910, ch. 659, § 120.

§ 1409. Jurisdiction. (See 3d Ed., p. 937.)

Repealed by L. 1910, ch. 659, § 120.

§ 1410. Practice. (See 3d Ed., p. 940.)

Repealed by L. 1910, ch. 659, § 120.

§ 1411. Justices to be magistrates. (See 3d Ed., p. 940.)

Repealed by L. 1910, ch. 659, § 120.

§ 1412. Adoption of rules. (See 3d Ed., p. 941.)

Repealed by L. 1910, ch. 659, § 120.

§ 1413. Regulation of times, etc. (See 3d Ed., p. 941.)

Repealed by L. 1910, ch. 659, § 120.

§ 1414. Appeals from special sessions. (See 3d Ed., p. 942.)

Repealed by L. 1910, ch. 659, § 120.

§ 1415. Duty of district attorney to attend court, etc. (See 3d Ed., p. 942.)

Repealed by L. 1910, ch. 659, § 120.

§ 1416. Qualification of justices of special sessions. (See 3d Ed., p. 943.)

Repealed by L. 1910, ch. 659, § 120.

§ 1417. Possession of courthouses. (See 3d Ed., p. 943.)

Repealed by L. 1910, ch. 659, § 120.

§ 1418. Children's court; jurisdiction. (See 3d Ed., p. 943.)

Repealed by L. 1910, ch. 659, § 120.

§ 1419. Courts of special sessions; additional jurisdiction.
(See 3d Ed., p. 946.)

Repealed by L. 1910, ch. 659, § 120.

§ 1435. Procedure for acquirement of lands and interests therein. (See 3d Ed., p. 949.)

Discontinuance of proceedings.

Proceedings for the taking of property under this chapter may be discontinued without leave of court. *People ex rel. Wynne v. Morris*, 143 App. Div. 293, 128 N. Y. Supp. 74,

§ 1436c. Owner of land may submit offer to sell. (See 3d Ed., p. 951.)

Offer by attorney of owner.

While this section requires that an offer to sell shall be made by the owner of the land, it seems that an attorney may make a valid offer on behalf of the owner. But where an attorney makes the offer, proof must be presented that he is in fact the attorney of, and has been authorized by the owner to make the offer. So *held*, holding an offer to be properly rejected by the city, where it was signed in the owner's name by "Joseph A. Flennerly, his attorney," and there was no other proof that the person signing was the attorney of the owner, and had been authorized by him to make the offer. *Matter of The City of New York (In re Baker)*, 112 App. Div. 160, 98 N. Y. Supp. 331; *Matter of City of New York (In re Herb)*, 112 App. Div. 163, 98 N. Y. Supp. 334; *Matter of City of New York (In re Hay)*, 112 App. Div. 165, 98 N. Y. Supp. 334.

The city held justified in rejecting an offer where the same attorney, who has made the offer on behalf of the owner served the corporation counsel, with a notice of appearance in a proceeding by another person claiming the same lands. *Matter of City of New York (In re Baker)*, 112 App. Div. 160, 98 N. Y. Supp. 331.

Sufficiency of offer.

An offer to sell lands at a specified price must be made by the owner, or by a person duly authorized to act for him, in such form that the offer if accepted by the city, would entitle it to specific performance of the contract. *Matter of City of New York (In re Baker)*, 102 App. Div. 160, 98 N. Y. Supp. 331.

Acquirement of lands; purchase of award by city. (New.)

§ 1436d. In any proceeding heretofore or hereafter instituted pursuant to any of the provisions of this statute, to wit, the Greater

New York charter, or pursuant to the provisions of any other statute providing for the acquisition of title to real estate, or any tenements, hereditaments, corporeal or incorporeal rights or interests in the same by the city of New York, in which title thereto shall have become vested in the said City of New York prior to the confirmation of the report of the commissioners in such proceeding, the board of estimate and apportionment shall have power, and is hereby authorized to purchase or to approve the purchase on behalf of said city of New York, from the individuals or corporations who were the owners of said property at the date of the vesting of title thereto in said city, or from their successors in interest or legal representatives, their right and title to the award or awards or any part thereof to be made in said proceeding and to take an assignment thereof to said city of New York. If such owner or owners or their successors in interest or legal representatives shall have transferred or assigned such claim, such transfer or assignment made by the said owner or owners or by their successors in interest or legal representatives shall not become binding upon the city of New York unless the instruments evidencing such transfer or assignment shall have been filed in the finance department of the city of New York prior to the completion of such purchase of said city of New York. Upon the completion of said purchase, the corporation counsel of the city of New York shall give notice thereof to the commissioners appointed in the proceeding, and upon the filing or service of such notice all the jurisdiction of the said commissioners over the parcel or parcels to which said purchase relates shall forthwith cease. (*Added by L. 1909, ch. 328.*)

§ 1437. Appointment and duties of commissioners of estimate.

(See 3d Ed., p. 951.)

Qualifications of commissioner.

An objection to the qualification of one of the commissioners cannot be raised for the first time on the application for the confirmation of his report. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

A commissioner of estimate and appraisal in the county of New York, is not required to be a person assessed for \$250 personal property or a freeholder as prescribed by § 1027 of the Code of Civil Procedure; it is enough that he or his wife owns personal property worth \$250, as prescribed by § 1079 of the Code of Civil Procedure. *Matter of Board of Education*, 51 Misc. 337, 100 N. Y. Supp. 327.

§ 1438. Reports of commissioners of estimate; presentation thereof to the court; when title to vest in city. (See 3d Ed., p. 953.)

Principles to be employed in estimating damage.

The commissioners cannot set off against the value of the land taken the benefits accruing by reason of the improvement to the land not taken. *Matter of City of New York (In re New St.)*, 64 Misc. 268, 118 N. Y. Supp. 580; *Same Case*, 63 Misc. 495, 117 N. Y. Supp. 409.

Under the provisions of this section requiring the commissioners to report their proceedings to the court with the minutes of the testimony taken by them, the commissioners cannot base their estimate of damage wholly upon the view of the premises, but must consider the evidence of the witnesses. Indeed the view of the premises is merely for the purpose of enabling them to better understand the evidence. *Matter of City of New York (In re Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 66; *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

The price paid upon a *bona fide* sale of the same property about the time of vesting of title in the city thereof furnished some, although not conclusive evidence as to its value, but in the absence of evidence that it was sacrificed or its sale was forced, or that other circumstances exist which would except the case from the general rule, it should be regarded as controlling. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

If the owner has purchased the property within a time so recent that its cost will afford any fair indication of its present value, it is competent to show the cost. So the cost of improvements recently put upon the property is admissible. If such evidence is received, it is competent for the opposite party to show any change of circumstances or conditions or other facts which would tend to make the value at the time of the taking more or less than the cost proved. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

Where buildings are suitable to the land, direct evidence of their structural value is admissible. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

Upon the taking of a building containing trade fixtures, they are to be regarded as real property for the purpose of making compensation and the tenant is under no obligation to remove them where his term has not expired, but the compensation therefor belongs to the tenant. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

The amount of compensation for trade fixtures should not be deducted from the amount previously determined to be just compensation to the owner of the land when the latter amount did not include the value of such

trade fixtures. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

Knowledge and experience of the individual commissioners as to the value of property taken may be applied to the evidence before them, but they can no more go outside the record evidence in making awards than the court can in reviewing the same. *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 660.

See cases cited under § 980, *ante*.

§ 1438a. Confirmation of report. (See 3d Ed., p. 955.)

Review of values.

The report of the commissioners will be set aside where the awards to owners are so grossly excessive as to indicate that the commissioners proceeded upon an erroneous theory. *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

An award in excess of what the owner claims or for less than the lowest estimate made by the city's experts will be set aside unless facts and circumstances are adduced which will afford some basis for a different valuation. *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 660; *Matter of City of New York (Avenue A)*, 66 Misc. 488, 122 N. Y. Supp. 321.

Where the award is materially below the estimates of the expert witnesses on both sides, and no awards were made to life tenants for their interest in certain portions of said parcel, the report will be referred back for revision and correction. *Matter of City of New York (New Street)*, 63 Misc. 495, 117 N. Y. Supp. 409.

The fact that the damages allowed are larger than the estimate of the city's experts and smaller than the estimate of the property owners' experts, is no ground for disturbing the awards, the amount of which is left largely to the discretion of the commissioners. *Matter of City of New York (New Street)*, 63 Misc. 495, 117 N. Y. Supp. 409.

The mere fact that an award is below the lowest estimate made by the claimant's witnesses affords no ground for the confirmation of the report where it appears that the claimant's experts in making their estimates of value overlooked the basic principal that the price paid or to be paid for lands, furnished some evidence of value in the absence of proof that the property was sacrificed at the sale concerning which the evidence was offered. *Matter of City of New York (Hamilton Place)*, 67 Misc. 191, 122 N. Y. Supp. 660.

An award of damages in a lump sum will be returned to the commissioners with instructions to specifically state and set forth the items entering into

the award, so as to facilitate the presentation of objections by the property owners upon motion to confirm the report. *Matter of City of New York (New Street)*, 63 Misc. 495, 117 N. Y. Supp. 409.

Where a property owner before the time set for hearing of the application to confirm the report moved for an order requiring the commissioners to make a supplemental report which should state certain details bearing upon the principle adopted by them in making their award, held that the motion should be denied; that the question whether the commissioners should be required to furnish such details or not, was one to be determined by the court upon the motion for the confirmation of the report. *In re Willis Ave., Bridge across Harlem River*, 117 N. Y. Supp. 1101.

§ 1439. When title may be vested by resolution. (See 3d Ed., p. 956.)

The adoption by the board of estimate and apportionment of a resolution that on a day specified, title to the property is to vest in the city, does not preclude the board from adopting another resolution postponing the vesting of title in the city until a future day. *Simpson v. Berkowitz*, 59 Misc. 160, 110 N. Y. Supp. 485.

See cases cited under § 990, *ante*.

§ 1442. Appeal. (See 3d Ed., p. 960.)

This section does not allow an appeal from an order of the Special Term refusing to confirm the report of the commissioners. *In re City of New York*, 143 App. Div. 302, 128 N. Y. Supp. 283, *aff'd* 202 N. Y. 607.

§ 1472. Public exhibitions to be licensed. (See 3d Ed., p. 972.)

Exhibitions not requiring license.

A gratuitous exhibition of dancing and singing in a restaurant conducted without stage, scenic effects or a programme and intended solely to attract patronage for the restaurant, *held*, not to be a public exhibition requiring a license under this section. Ct. of Spec. Sess., *Deuel, J., People v. Martin*, N. Y. Law Jour., February 8th, 1912.

An exhibition of moving pictures in an ice cream saloon for the purpose of attracting customers to which no entrance fee is charged, is not within this section which requires the payment of a license fee of \$500 for the exhibitions specified therein. But such an exhibition is a "common show" within the meaning of § 51 of the charter and the ordinance adopted by the board of alderman requiring common shows to be licensed. *Weistblatt v. Bingham*, 58 Misc. 328; 109 N. Y. Supp. 545; but compare *People v. Hemleb*, 127 App. Div. 356, 111 N. Y. Supp. 690.

Theater private undertaking.

The provisions of this section providing for theatrical licenses confers no new rights upon the patrons of theaters. The proprietor of a theater conducts a private business, which, even if clothed with a public interest, is not a franchise to accommodate the public, and he therefore has the right to control the same as the proprietors of any other business, subject to such obligations as are imposed upon him by the Civil Rights act. *Collister v. Hayman*, 183 N. Y. 250, aff'g 91 App. Div. 612, 86 N. Y. Supp. 1132.

*** Police department grants license; fee; penalty for neglect to obtain license. (See 3d Ed., p. 973.)**

§ 1473. *The police department is hereby authorized and empowered to grant such license, to continue in force until the first day of May next, ensuing the grant thereof, on receiving for each license so granted, and before the issuing thereof, the sum of five hundred dollars; except that in the borough of Richmond the fee for such license shall be one hundred dollars; and every manager or proprietor of any such exhibition or performance who shall neglect to take out such license, or consent, or cause, or allow any such exhibition or performance or any single one of them without such license, and every person aiding in such exhibition, and every owner or lessee of any building, part of a building, garden, grounds, concert room or other room or place, who shall lease or let the same for the purpose of any such exhibition or performance or assent that the same be used for any such purpose, except as permitted by such license, and without such license having been previously obtained and then in force if the same shall be used for such purpose, shall be subject to a penalty of one hundred dollars for every such exhibition or performance which penalty shall be prosecuted, sued for and recovered in the name of the city of New York, and shall be paid to the chamberlain of the city of New York, to be paid into the treasury of said city. (*As amended by L. 1901, ch. 412.*)

License discretionary.

The granting of a license by the police department under this section is purely discretionary and cannot be controlled by mandamus unless its action in refusing to grant a license is arbitrary, tyrannical, or unreasonable or is based upon false information. *People ex rel. Rota v. Baker*, 136 App. Div. 7, 120 N. Y. Supp. 161.

The refusal of the police commissioner to grant a theater license is not a judicial determination, but an administrative act and therefore is not

* This section is reprinted for the reason that a part of it was omitted in the third edition of this work.

reviewable by certiorari. *People v. Baker*, 67 Misc. 539, 124 N. Y. Supp. 751.

An injunction *pendente lite* cannot be granted restraining the police commissioner from interfering with the operation of a theater without a license until it has been determined in a pending proceeding at law whether or not the refusal of the commissioner to renew the license was justifiable. *Bartelstone v. Miller*, Sp. T., Giegerich, J., N. Y. Law Jour., June 10th, 1911.

Ibid; * commutation of license fee.

§ 1474. The said police department is hereby authorized to grant licenses for said exhibitions or performances for any term less than one year, and in any case where such license is for a term of three months or less, the said police department is hereby authorized to commute for a sum less than five hundred dollars, but in no case less than two hundred and fifty dollars for a theater, or one hundred and fifty dollars for a circus, concert room, or other building or place whatsoever; except that in the borough of Richmond no license shall be granted for less than six months and the fee therefor shall be fifty dollars. (*As amended by L. 1901, ch. 412.*)

§ 1476. Revocation of license. (See 3d Ed., p. 974.)

Owing to the repeal of § 1481, *post*, by the city ordinance approved December 19, 1907, a license cannot be summarily annulled under this section for violation of the Sunday Law and the only way to revoke such license is by obtaining a judgment for the penalty prescribed by the ordinance which of itself annuls the license. *Matter of City of New York (Morris Theatrical License)*, 131 App. Div. 767, 116 N. Y. Supp. 353.

The following authorities relating to the revocation of licenses under this section seem no longer applicable because of the repeal of § 1481, *post*, by the city ordinance approved December 19, 1907. *People ex rel. Hammerstein v. O'Gorman*, 124 App. Div. 222, 108 N. Y. Supp. 737; *Matter of Hammerstein*, 57 Misc. 52, 108 N. Y. Supp. 197; *People v. Finn*, 57 Misc. 659, 110 N. Y. Supp. 22; *Matter of Hammerstein*, 52 Misc. 606, 102 N. Y. Supp. 950.

While an order overruling preliminary objections to the jurisdiction of a judge in a proceeding to summarily revoke a theater license under this section is not appealable and can only be reviewed by writ of prohibition, yet, where the judge instead of hearing the proofs himself, appoints a referee to take the same, the order of reference is appealable and on such appeal the

* This section is reprinted for the reason that a part of it was omitted in the third edition of this work.

whole question is before the court. *Matter of City of New York (Morris Theatrical License)*, 131 App. Div. 767, 116 N. Y. Supp. 353.

§ 1481. Exhibitions on Sunday prohibited. (See 3d Ed., p. 977.)

The provisions of this section were repealed by the city ordinance approved December 19, 1907, prohibiting theatrical performances on Sundays with certain exceptions, and providing that any person, violating the provisions of said section should be subject to a penalty of \$500, to be recovered by the corporation counsel, and that the recovery of a judgment for the penalty should of itself annul the license. *Matter of City of N. Y. (Morris Theatrical License)*, 131 App. Div. 767, 116 N. Y. Supp. 353.

The city ordinance approved December 19th, 1907, which prohibits unauthorized performances on Sunday and fixes a penalty recoverable by the city and further provides that the recovery of judgment should of itself revoke a license is not invalidated by Penal Law, § 2152, which makes the same acts a misdemeanor and fixes a penalty to be recovered by the Society for the Reformation of Juvenile Delinquents. *City of New York v. Alhambra Theater*, 136 App. Div. 509, 121 N. Y. Supp. 3, rev'g 63 Misc. 442, 118 N. Y. Supp. 471.

Public dance hall; defined. (New.)

§ 1488. The words "public dance hall," when used in this title, shall be taken to mean

Any room, place or space in The City of New York in which dancing is carried on and to which admission can be had by payment of a fee, or by the purchase, possession or presentation of a ticket or token, or in which a charge is made for caring for clothing or other property, other than a hotel having upwards of fifty bedrooms, or

Any room, place or space in The City of New York, located upon premises which are licensed to sell liquors, other than a hotel having upwards of fifty bedrooms, in which dancing is carried on and to which the public may gain admission, either with or without payment of fee.

The word "dancing" as used in this and the succeeding sections shall not apply to exhibitions or performances in which the persons paying for admission do not participate. (*Added by L. 1910, ch. 547.*)

See L. 1909, ch. 400.

Sections 1488-1494 as originally enacted by L. 1909, ch. 400, were declared unconstitutional in *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, aff'g 134 App. Div. 965. The statute was subsequently amended by L. 1910, ch. 547,

which was framed so as to meet the constitutional objections pointed out by the court in the original statute.

Public dance hall; dancing academy forbidden without license. (New.)

§ 1489. No public dance hall shall be conducted nor shall dancing be taught or permitted in any public dance hall unless it shall be licensed pursuant to this act and the license be in force and not suspended. Any person violating this section shall be guilty of a misdemeanor. (*Added by L. 1910, ch. 547.*)

See L. 1909, ch. 400.

Public dance hall; license of; requirements. (New.)

§ 1490. All public dance halls shall be licensed by the mayor or other licensing authority of the city of New York; the fee for each such license shall be fifty dollars for each year or fraction thereof. All licenses issued on or between the first day of April and the thirtieth day of September of any year shall expire on the thirty-first day of March of the succeeding year. All licenses issued on or between the first day of October and the thirty-first day of March of any year shall expire on the thirtieth day of September of the succeeding year. No license shall be issued unless the place for which it is issued complies with all laws, ordinances, rules and the provisions of any building code applicable thereto and is a safe and proper place for the purpose for which it shall be used, properly ventilated and supplied with sufficient toilet conveniences. Every licensed public dance hall shall post its license at the main entrance to its premises. (*Added by L. 1910, ch. 547.*)

See L. 1909, ch. 400.

No license without report after inspection. (New.)

§ 1491. No license shall be issued until the licensing authority shall have received a written report of an inspector that the building or premises to be licensed complies with section fourteen hundred and ninety of this title. No license shall be renewed except after reinspection by the licensing authority. Additional inspection of every licensed place may be made under the direction of the licensing authority. All inspectors shall be permitted to have access to all public dance halls at all reasonable times and whenever they are open for dancing, instruction in dancing or for any other purpose. Inspectors shall be required to report all violations. All

reports shall be in writing and shall be filed and made public records. (*Added by L. 1910, ch. 547.*)

See L. 1909, ch. 400.

Public dance halls; sale of liquors therein. (New.)

§ 1492. Dancing shall not be permitted in any place in the city of New York licensed to sell liquors, except in a hotel having upwards of fifty bedrooms, unless such place shall also be licensed under section fourteen hundred and ninety. Violation of this provision shall be deemed a violation of the liquor tax law with respect to such premises. No liquors shall be sold, served or given away, in any public dance hall in which dancing is advertised to be taught, or in which classes in dancing are advertised to be maintained, or in which instruction in dancing is given for hire; or in any room connected with such hall. The word "liquors" as used in this section shall be construed as defined in the liquor tax law of this state.

The licensing authority shall immediately notify the state commissioner of excise of the granting or renewal or revocation or forfeiture of any license issued under this title to any place or premises which are licensed to sell liquor. (*Added by L. 1910, ch. 547.*)

See L. 1909, ch. 400.

License; when forfeited or revoked. (New.)

§ 1493. The license of any public dance hall may be forfeited for habitual disorderly or immoral conduct permitted on the premises and shall be forfeited on conviction of any person for violation of section fourteen hundred and ninety-two of this act, or upon the conviction of any person for violation of section fourteen hundred and eighty-four or section eleven hundred and forty-six of the penal law in or with respect to the premises of any public dance hall. The license of any public dance hall may be revoked by the licensing authority whenever the licensed premises do not comply with section fourteen hundred and ninety of this act, provided that the licensee or person in charge shall be served with a copy of the report or complaint. In any case where a license is revoked or where the licensing authority refuses to renew a license, reasons for the action must be stated in writing and shall be public records. Should the license of any place have been revoked twice within a period of six months, no new license shall be granted to such place for a period of at least one year from the date of the second revocation. (*Added by L. 1910, ch. 547.*)

See L. 1909, ch. 400.

Inspectors of dancing academies; appointment of. (New.)

§ 1494. The mayor or licensing authority of the city of New York may appoint such inspectors and other officials necessary to carry out the provisions of section fourteen hundred and eighty-nine, fourteen hundred and ninety, fourteen hundred and ninety-one, fourteen hundred and ninety-two and fourteen hundred and ninety-three as may be authorized by the board of estimate and apportionment of the city or authority having the right to appropriate public money. The money paid for licenses under this act shall be applied toward the payment of the salaries of the inspectors appointed hereunder. Any deficiency and any other expense in carrying this act into effect until appropriation can be made therefor shall be met by the issue of special revenue bonds of the city. The inspectors to be appointed under this section shall be designated inspectors of public dance halls. (*Added by L. 1910, ch. 547.*)

See L. 1909, ch. 400.

District attorney; residence; assistants. (See 3d Ed., p. 98)

§ 1503. The district attorney of the county of New York shall receive for his services as such district attorney a yearly salary of fifteen thousand dollars and shall be paid in equal monthly payments. There shall be fourteen assistant district attorneys in said county, who shall each receive a yearly salary of seven thousand five hundred dollars. The office is so far local as to require residence of the district attorney and his assistants within the county. (*As amended by L. 1911, ch. 516.*)

§ 1534. Officers; may be summarily examined. (See 3d Ed. p. 992.)

The powers of the commissioners of account to conduct examinations of public officials under § 119, *ante*, are not affected by the provisions of this section, giving like powers to a justice of the supreme court. *Matt Hertle*, 54 Misc. 354, 105 N. Y. Supp. 1022, *aff'd* 120 App. Div. 717, 190 N. Y. Supp. 765, *aff'd* 190 N. Y. 531.

Creating cemeteries in Queens County prohibited. (See 3d Ed., p. 994.)

§ 1539a. After this section as hereby amended takes effect no person, association or corporation shall take by deed, devise or otherwise any land in the county of Queens for cemetery purposes nor set apart or use any ground for cemetery purposes in such county. Existing cemetery associations and corporations, however, shall have the right to use for cemetery purposes, land lawfully taken

by recorded deed, or devise and set apart for cemetery purposes or for the purposes of the convenient transaction of their general business, prior to or used therefor, at the time this act takes effect, and all lands taken by a recorded deed and actually set apart for cemetery purposes prior to June twenty-fifth, nineteen hundred and ten. (*As amended by L. 1911, ch. 813.*)

The granting by the board of aldermen of an application by a cemetery association to use lands for a cemetery in Queens County and the publication by the cemetery association of the notice required by this section for six successive weeks describing the lands as 112 acres *held* not to deprive the board of aldermen of power to reconsider its action and the board may after the publication of the notice has been completed, reduce the quantity of land without publication of a new notice stating the lesser acreage. *Rottkamp v. Springfield L. I. Cemetery Society*, 134 App. Div. 270, 118 N. Y. Supp. 911. Compare *Palmer v. Hickory Grove Cemetery*, 84 App. Div. 600, 82 N. Y. Supp. 973; Same case, 106 App. Div. 631; 95 N. Y. Supp. 1150, *aff'd* 186 N. Y. 593.

Majority of boards of departments; quorum; powers. (See 3d Ed., p. 995.)

§ 1541. A majority of the members of a board in any department of the city government, and also of the board for the revision of assessments, shall constitute a quorum to fully perform and discharge any act or duty authorized, possessed by, or imposed upon any department or any board aforesaid, and with the same legal effect as if every member of any such board aforesaid had been present, except as herein otherwise specially provided. Each board may, except as herein otherwise provided, choose, in its own pleasure, one of its members, who shall be its president, and one who shall be its treasurer, and may appoint a chief clerk or secretary. No expense shall be incurred by any of the departments, boards or officers thereof, unless an appropriation shall have been previously made covering such expense, nor any expense in excess of the sum appropriated in accordance with law. This restriction shall not apply

Board of health, board of Bellevue and allied hospitals, the commissioner of public charities and the commissioner of correction; powers in relation to physicians and nurses employed in hospitals of city. (New.)

§ 1542a. The board of health, the board of trustees of Bellevue and allied hospitals, the commissioner of public charities, and the commissioner of correction, are, and each of them hereby is, authorized when in its or his judgment it may seem proper, to cause to be removed for medical or surgical treatment in any public or private hospital within the city of New York any nurse or physician who may be employed in any of the hospitals within the charge and control of any of said boards or commissioners, respectively, and who may become ill or disabled on account of any contagious or infectious disease contracted while in the performance of service as such nurse or physician. The reasonable expense incurred for said medical or surgical treatment, together with maintenance, shall, upon certificate of any of said boards or commissioners, respectively, be a charge against the city of New York. The comptroller is hereby authorized to audit and pay charges which may be so certified by any of said boards or commissioners, respectively, to have been incurred since January first, nineteen hundred and nine, and which may hereafter be certified by any of said respective boards or commissioners, respectively, for the foregoing purposes; and to provide the means necessary to make such payments the comptroller is hereby authorized to issue special revenue bonds in the manner provided by section one hundred and eighty-eight, subdivision seven, of this act. (*Added by L. 1910, ch. 267.*)

§ 1543. Heads of departments; control over subordinates; removal. (See 3d Ed., p. 997.)

Regular clerks, defined.

The position of "regular clerk" since the enactment of the Civil Service Law is included within the competitive class of the civil service. It follows that a person appointed to a position classified by the civil service commission as not subject to the competitive examination is not a "regular clerk" within the meaning of this section, and may be removed without the formalities prescribed therein, i. e., notice of charges and an opportunity for an explanation. The classification of the position by the civil service commission as not subject to competitive examination, is conclusive upon the incumbent in a proceeding brought to compel his reinstatement. *People ex rel. Corkill v. McAdoo*, 113 App. Div. 770, 99 N. Y. Supp. 324.

Head of bureau, creation of.

The borough president under § 383, *ante*, has the same power to organize bureaus in his department as was conferred upon the commissioner of high-

ways by § 458, of the charter (L. 1897, ch. 378). Accordingly, the head of a bureau established by the president of a borough for the convenience of administration, is entitled to the protection from summary removal given to the head of a bureau by this section. *People ex rel. Collins v. Ahearn*, 193 N. Y. 441, rev'g 124 App. Div. 939, 109 N. Y. Supp. 1141, and rev'g in effect *People ex rel. Michaels v. Ahearn*, 111 App. Div. 741, 98 N. Y. Supp. 492; *People ex rel. Collins v. Ahearn*, 120 App. Div. 95, 104 N. Y. Supp. 860.

Competitive class of the civil service.

The summary removal of a person holding a position in the competitive class of the civil service without an opportunity for explanation, etc., cannot be sustained on the ground that the city had exceeded its authority in placing the position in the competitive class of the civil service. *Craigie v. City of New York*, 114 App. Div. 880, 100 N. Y. Supp. 197.

It seems that an employee of a department whose appointment has become permanent by reason of the expiration of the probationary period, may be removed after notice and an opportunity for explanation for acts done within that period. *Matter of Dalton v. Darlington*, 123 App. Div. 855, 105 N. Y. Supp. 626.

For other cases involving removals during probationary period, see cases cited under § 124, *ante*.

One holding a position in the non-competitive class of the civil service is not entitled to a probationary tenure of three months like competitive appointees, and may be removed at any time by the head of the department for violation of the rules of the department, e. g., absence without leave. *People ex rel. Koeber v. Bensel*, 131 App. Div. 89, 115 N. Y. Supp. 214.

Transfer from one position to another, when removal.

A subordinate who has been transferred from a higher salaried position to a lower salaried position cannot sue the city for the difference upon the ground that he has been illegally removed from the former position unless he has sought and obtained reinstatement to the position by mandamus. *Twombly v. City of New York*, 70 Misc. 515, 127 N. Y. Supp. 388.

Reduction of salary when not a removal.

The provisions of L. 1902, ch. 436, conferred upon the board of estimate within the period prescribed by the statute, the unlimited power to fix the salaries of the clerks of the city department without regard to the provisions of the Civil Service Law and this section. The fact, therefore, that the salary of a clerk was reduced to such an extent that his position fell to a lower grade in the civil service did not constitute a removal within this section, and he was not entitled to recover from the city the amount his salary was reduced. *Walters v. City of New York*, 190 N. Y. 375, aff'g 119 App. Div. 464, 105 N. Y. Supp. 950.

Notice of charges.

Twenty-four hours notice of charges are sufficient where relator made no complaint upon the hearing and did not ask for an adjournment and raises the question that reasonable time had not been given him to prepare for the opportunity to make explanation for the first time upon the proceeding to compel his reinstatement. *People ex rel. Baum v. Butler*, 120 App. Div. 807, 105 N. Y. Supp. 606. Appeal dismissed 190 N. Y. 561.

Where a member of a department was alleged to have been guilty of insolent conduct upon a hearing before a deputy commissioner and was immediately taken before the commissioner and charged therewith, and was then and there afforded an opportunity for explanation which he refused to give upon the ground that he had not been given a reasonable notice of charges, *held* that he was not entitled to reinstatement; that the statute fixed no time within which notice of charges must be given, and that he had reasonable notice of the charges under the circumstances of the case. *People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161, *aff'd* 179 N. Y. 525.

Grounds assigned for removal.

The cause assigned by the head of a department for the removal of a subordinate holding a position in the classified civil service must be substantial and not shadowy. To be substantial, the cause assigned must be some dereliction on the part of the subordinate, or neglect of duty, or something affecting his character or fitness for the position. The statement of the causes for removal is not a mere form to precede a predetermined removal. So *held*, holding that charges against a subordinate removed by the head of the department were unsubstantial and did not justify his removal. *Matter of Griffin v. Thompson*, 202 N. Y. 104, *rev'g* 140 App. Div. 904, 125 N. Y. Supp. 1123.

Where an employee of the department has been removed after notice and an opportunity for explanation, *held* that the inadvertent omission of the head of the department, to state the true grounds of removal in the records of the department, furnishes no grounds for reinstatement, especially where the entry had been corrected prior to the institution of the proceedings to compel reinstatement. *People ex rel. April v. Butler*, 122 App. Div. 791, 107 N. Y. Supp. 833; *People ex rel. Brown v. O'Brien*, 137 App. Div. 311, 122 N. Y. Supp. 25.

Removal not reviewable upon the merits.

The provisions of this section that no regular clerk, head of a bureau or person holding a position in the competitive class of the civil service shall be removed until he has been afforded an opportunity of making an explanation, was not intended to confer upon the persons protected from a summary removal by this section, the right to a trial or judicial hearing. The head of the department, if the explanations are not satisfactory to him, may, in his discretion, remove without calling witnesses to substantiate the charges

or allowing testimony on the part of the subordinate. He may exercise the power of removal upon facts within his own knowledge or based upon information received from others. The reasons assigned for the removal must appear upon their face to justify the action; in other words, they must be substantial and not frivolous, but when they appear to be sufficient to justify the determination the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the head of the department. *People ex rel. Baum v. Butler*, 120 App. Div. 807, 105 N. Y. Supp. 606. Appeal dismissed 190 N. Y. 561.

Remedies for removal made without compliance with prescribed formalities.

Mandamus will not lie to review the action of the head of a department in removing an employee after due notice of charges and an opportunity to make an explanation. The court on mandamus will only inquire into the question whether the procedure provided by the statute as a condition of removal has been complied with. If the requirements of the statute have been followed by the head of the department, the court has no power to consider the charges on the merits. *People ex rel. Brown v. O'Brien*, 137 App. Div. 311, 122 N. Y. Supp. 25.

A subordinate who has been reinstated to his position by the courts is entitled to a restoration in fact and not simply in form to his previous standing in the department, with an assignment to the duties that attached to the position at the time of his discharge or to duties substantially similar thereto. *People ex rel. LaChicotte v. Stevenson*, 57 Misc. 64, 108 N. Y. Supp. 860.

A subordinate of a city department whose position is not provided for by the charter, but has been created under the general provisions of the charter authorizing heads of the department with the approval of the board of estimate or the common council of appointing the necessary subordinates for the discharge of the duties of the department, is not a public officer, and therefore, when removed without an opportunity for explanation, and another person has been appointed to fill the vacancy created by his removal, he may compel reinstatement by mandamus, and is not required to resort to the proceeding in *quo warranto*. *People ex rel. Hofe v. Cahill*, 188 N. Y. 489, rev'g 116 App. Div. 855, 102 N. Y. Supp. 325.

The present incumbent of a position from which the relator had been removed, is not a necessary party to a proceeding by mandamus to compel his reinstatement. *People ex rel. Michaels v. Ahearn*, 111 App. Div. 741, 98 N. Y. Supp. 492, overruled, on other grounds, in 193 N. Y. 443.

In a mandamus proceeding to compel reinstatement of a superintendent of highways illegally removed by a borough president without a hearing on charges preferred, allegations in the answer of misconduct by the relator

prior to his removal are irrelevant and should be stricken out. This because to allow the allegations to stand, would enable the respondent to evade the statute by showing that charges might have been preferred prior to the removal. *People ex rel. Collins v. Ahearn*, 133 App. Div. 52, 117 N. Y. Supp. 810, aff'd 196 N. Y. 572.

Proceedings by mandamus to compel the reinstatement of a member of the department removed in violation of this section, do not abate by reason of the resignation, removal or expiration of term of the head of the department, but may be continued against his successor or successors to the office. *People ex rel. LaChicotte v. Best*, 187 N. Y. 1; *People ex rel. Collins v. Ahearn*, 146 App. Div. 135, 130 N. Y. Supp. 497.

Where a commissioner of highways who had been removed by the borough president, instituted mandamus to compel his reinstatement and pending the proceeding, the borough president is removed by the governor, *held* that no further steps could be taken by the relator until the successor in office to the borough president had been substituted as a party to the proceeding. *People ex rel. Collins v. Ahearn*, No. 1, 137 App. Div. 260, 121 N. Y. Supp. 966; *People ex rel. Walker v. Ahearn*, 200 N. Y. 146.

A delay of more than four months in instituting proceedings for reinstatement constitutes laches in the absence of special circumstances excusing a longer delay. *People ex rel. Collins v. Ahearn*, 120 App. Div. 95, 104 N. Y. Supp. 60; *People ex rel. Shuter v. Butler*, 54 Misc. 18, 103 N. Y. Supp. 583; *People ex rel. Benjamin v. Thompson, etc.*, Sp. T., Gavegan, J., N. Y. Law Jour., July 17th, 1911.

The court has no power to impose as a condition of granting an alternative mandamus, where it finds the relator not entitled to a preëemptory mandamus, that the relator shall waive all claim to salary during the period of his removal. *People ex rel. Collins v. Ahearn*, 115 App. Div. 171, 100 N. Y. Supp. 716.

Abolition of position, rights and remedies of incumbent.

An employee of the department whose position has been abolished in bad faith, is entitled to reinstatement by mandamus. *Shane v. City of New York*, 135 App. Div. 218, 120 N. Y. Supp. 428, aff'g 63 Misc. 304, 116 N. Y. Supp. 685.

The head of the department may suspend, without pay, an employee holding a position in the classified civil service, when the work performed by him may be more economically done at other seasons of the year. *Shane v. City of New York*, 135 App. Div. 218, 120 N. Y. Supp. 428, aff'g 63 Misc. 304, 116 N. Y. Supp. 685.

The abolition of a position by the head of a department does not operate as a removal from office but by virtue of this section the incumbent is suspended without pay for one year within which time he remains eligible, ac-

according to his original ranking upon the civil service list, for appointment to a similar position. *People ex rel. Vineing v. Hayes*, 135 App. Div. 19, 119 N. Y. Supp. 808; *Shane v. City of New York*, 135 App. Div. 218, 120 N. Y. Supp. 428, aff'g 63 Misc. 304, 116 N. Y. Supp. 685.

A subordinate whose position has been discontinued owing to a readjustment of the positions in the department, is entitled to be placed upon the list of suspended employees eligible to reappointment within one year, and the head of the department has no power thereafter to remove him from the position which has ceased to exist by its discontinuance. *Matter of Colihan v. Miller*, 72 Misc. 140, 131 N. Y. Supp. 99.

An employee whose position has been abolished does not cease to be a member of the department but is merely deemed to be suspended without pay, and entitled to reinstatement to a similar position within one year of the abolition of his position. So *held*, holding that the widow of an employee of the fire department whose position had been abolished just prior to his death was entitled to the pension provided for by § 792, *ante*. *Reidy v. City of New York*, 185 N. Y. 141, rev'g 103 App. Div. 361, 93 N. Y. Supp. 16.

Salary during period of removal.

An action cannot be maintained against the city for loss of salary occasioned by an illegal removal until the incumbent has sought and obtained reinstatement to the department. *Shane v. City of New York*, 135 App. Div. 218, 120 N. Y. Supp. 428, aff'g 63 Misc. 304, 116 N. Y. Supp. 685; *Sutcliffe v. City of New York*, 132 App. Div. 831, 117 N. Y. Supp. 813 rev'g 61 Misc. 514, 115 N. Y. Supp. 186.

It is no ground for the refusal to grant a writ of mandamus to compel reinstatement that relator's position was abolished subsequent to his unlawful removal since reinstatement by mandamus is a condition precedent to relator's right to recover salary during the period he was prevented from performing the duties of his position. *Sp. T., Bischoff, J., People ex rel. Collins v. McAneny*, N. Y. Law Jour., February 29, 1912.

An employee of the department who has been reinstated to a position by mandamus from which he had been removed without an opportunity for explanation, *held* not entitled to recover from the city the salary of the position in question between the date of his removal and the date of his reinstatement where, during such interval, the salary of the position has been paid to another regularly appointed in his place, who performed the duties of the position. *Grant v. City of New York*, 111 App. Div. 160, 97 N. Y. Supp. 685; *City of New York v. Voorhis*, 129 N. Y. Supp. 832; *Sutcliffe v. City of New York*, 132 App. Div. 831, 117 N. Y. Supp. 813, rev'g 61 Misc. 514, 115 N. Y. Supp. 186.

Where the position of an employee had been abolished by the head of the department and he had been reemployed in another position, *held*, that he

was not entitled to recover the salary attached to the former position. *Shane v. City of New York*, 135 App. Div. 218, 120 N. Y. Supp. 428, aff'g 63 Misc. 304, 116 N. Y. Supp. 685.

Where an employee sued the city to recover salary he should have received during the period of removal, *held*, that the city could offset the amount earned by the employee in other occupations during the same period. *Sutcliffe v. City of New York*, 132 App. Div. 831, 117 N. Y. Supp. 813, rev'g 61 Misc. 514, 115 N. Y. Supp. 186.

An examiner in the board of education receiving \$1,200, when entitled to \$1,500 per annum, signed a written consent to his transfer to the department of finance at a yearly salary of \$1,200; *held*, that he was estopped from claiming from the latter board the difference between \$1,200 and \$1,500; rate for the time he worked in the department of finance. *Twombly v. City of New York*, 70 Misc. 515, 127 N. Y. Supp. 388.

Where one holding a position in the classified civil service has been transferred to another position in the competitive class and tenders his services in the latter position which are refused, *held*, that he was entitled to recover the salary attached to the position although he never actually rendered any services. A person can only be removed from such position by compliance with this section, and when not so removed and his tender of services is refused, the municipality is liable as for a breach of contract of employment. *Allen v. City of New York*, 120 App. Div. 539, 104 N. Y. Supp. 919.

A foreman of stonecutters in the bureau of highways does not hold a statutory office to which the salary attaches as an incident; and, therefore, although, being a veteran, he was unlawfully discharged and afterwards reinstated, the city is not liable for his compensation during the period of removal. *O'Donnell v. City of New York*, 128 App. Div. 186, 112 N. Y. Supp. 760.

An inspector of masonry of the city of New York does not hold a public office to which the salary is an incident, but is a mere employee and therefore cannot recover from the city compensation during a period he has been laid off from employment on account of lack of work, although he is a volunteer fireman, who by the statute is entitled to a preference to employment. *Dunne v. City of New York*, 116 App. Div. 331, 101 N. Y. Supp. 678.

Upon reinstatement of an unskilled laborer illegally removed, *held*, that he could not recover compensation during the period he was prevented from performing his duties. *Walsh v. City of New York*, 143 App. Div. 150, 127 N. Y. Supp. 972; *Doyle v. City of New York*, 132 N. Y. Supp. 774.

Personal liability of head of department.

The borough president cannot be charged personally with damages for the loss of salary suffered by the relator during his removal from office, where

the removal was made in good faith, without improper motive, through a misunderstanding as to his powers under the charter. *People ex rel. Walker v. Ahearn*, 139 App. Div. 88, 123 N. Y. Supp. 845. Appeal dismissed, 200 N. Y. 146.

Police and fire commissioners may rehear charges and reinstate members of force. (New.)

§ 1543a. Upon written application to the mayor by the person aggrieved, setting forth the reasons for demanding such rehearing, the police commissioner, if the person aggrieved was a member of the police force, or the fire commissioner, if the person aggrieved was a member of the fire department, shall have the power, in his discretion, to rehear the charges upon which a member of the uniformed police or fire department, as the case may be, has been dismissed, unless such dismissal was for insubordination, conduct unbecoming an officer or member, cowardice or intoxication; provided that such former member of such force or department shall waive in writing all claim against the city of New York for back pay and provided further that the mayor shall, in writing, consent to such rehearing, stating the reasons why such charges should be reheard.

Such application for a rehearing shall be made within one year after this act takes effect or within one year from the date of the removal if such removal occurs after this act takes effect.

If such commissioner shall determine that such member has been illegally or unjustly dismissed, such commissioner may reinstate such member and allow him the whole of his time since such dismissal, to be applied on his time of service in such department, or for such other or further relief as such commissioner may determine just, or to affirm his dismissal as he may determine from the evidence. (*Added by L. 1907, ch. 723.*)

§ 1545. Heads of departments; to furnish copies of papers on demand. (See 3d Ed., p. 1007.)

A taxpayer is not entitled under this section to a general inspection of the records of the health department unless he shows that he has some legitimate interest in the records or is inspired by a commendable motive in seeking the inspection. *In re Allen*, 131 N. Y. Supp. 1027.

Neither this section nor § 51 of the General Municipal Law providing that all books of minutes, entries of accounts, etc., connected with or filed in the office of a board or commission, acting on behalf of a municipal corporation shall be records and shall be open to the inspection of any taxpayer, entitles a taxpayer to the inspection of the minutes and records of proceedings taken

One appointed Jewish chaplain for Bellevue and allied hospitals and who is also thereafter appointed visiting chaplain in the department of public charities, *held*, that he was not an officer of the city within the prohibition of this section. *Blum v. City of New York*, 61 Misc. 104, 112 N. Y. Supp. 1071.

Public property to be sold at auction or by sealed bids. (See 3d Ed., p. 1012.)

§ 1553. All property sold (other than land under water) shall be sold at auction, after previous public notice, under the superintendence of the appropriate head of department, except real property including buildings, fixtures and machinery therein, which, except as herein otherwise provided, shall be sold at public auction, or by sealed bids, after previous public notice, pursuant to a resolution adopted by the commissioners of the sinking fund and such sale shall be under the supervision of said commissioners and not otherwise. In case such buildings, fixtures and machinery be sold at public auction the commissioners of the sinking fund may provide as a condition of such sale that such buildings, fixtures or machinery shall not in any case be relocated or reerected within the lines of any proposed street or other public improvement, and if after such sale such buildings or parts of buildings or other structures be relocated or reerected within the lines of any proposed street or other public improvement, title thereto shall thereupon become vested in the city of New York and a resale at public or private sale may be made in the same manner as if no prior sale had been made of the same. The proceeds of all sales made under and by virtue of this act shall, except as herein otherwise specially provided, be by the officer receiving the same immediately deposited with the chamberlain; and the account of sales verified by the officer making the sales shall be immediately filed in the office of the comptroller. (*As amended by L. 1909, ch. 398, § 2.*)

The superintendent of buildings cannot refuse permission to make alterations upon buildings formerly owned by the city under § 407, *ante*, upon the ground that they were not sold by the comptroller at public auction as required by this section. *Hurwitz v. Moore*, 132 App. Div. 29, 116 N. Y. Supp. 248.

§ 1554. Patented articles; how supplied. (See 3d Ed., p. 1012.)

This section does not absolutely prohibit the city from contracting for a patented pavement but only requires that proposals for bids shall be so devised as to afford reasonable opportunity for competition between the owners of patented and unpatented pavements. Proposals for bids examined and held to constitute a sufficient basis for competition between patented and unpatented pavements. *Warren Bros. Co. v. City of New York*, 190 N. Y. 297, rev'g 119 App. Div. 856, 103 N. Y. Supp. 1145; *Holly v. City of New York*, 128 App. Div. 499, 112 N. Y. Supp. 797; *Hastings Pavement Co. v. Cromwell*, 67 Misc. 212, 124 N. Y. Supp. 388.

An unpatented pipe joint, even though made by patented machinery is not a patented article within the meaning of this section. *Holly v. City of New York*, 128 App. Div. 499, 112 N. Y. Supp. 797.

§ 1556. Code of ordinances; when to be prima facie evidence
(See 3d Ed., p. 1013.)

Judicial notice of ordinances.

The courts will not take judicial notice of the ordinances of the city New York. *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 8, 109 N. Y. Supp. 249; *Sachs v. Lyons*, 53 Misc. 642, 103 N. Y. Supp. 149. Compare cases cited under § 1172, *ante*, with respect to the court taking judicial notice of the Sanitary Code.

§ 1565. Public armories; armory board; president of board of aldermen to be a member of; its duties. (3d Ed., p. 1016.)

The armory board has no power to create an indebtedness binding the city until authorized to incur such indebtedness by the commission of the sinking fund. *Horgan & Slattery v. City of New York*, 114 App. Div. 555, 100 N. Y. Supp. 68.

The secretary of the armory board has no power to order repairs expressly or impliedly authorized by the armory board to order the repairs. *Moriarty v. City of New York*, 59 Misc. 204, 110 N. Y. Supp. 842, reversed on other grounds in 142 App. Div. 717, 127 N. Y. Supp. 524.

The action of the secretary of the armory board in ordering certain emergency repairs, *held*, ratified by the approval by the armory board of the secretary. *Moriarty v. City of New York*, 142 App. Div. 717, 127 N. Y. Supp. 524, *rev'd* 59 Misc. 204, 110 N. Y. Supp. 842.

City employees; vacations regulated. (New.)

§ 1567. The executive heads of the various departments are authorized and empowered to grant to every employee of the city of New York, or of any department or bureau thereof, and of the department of education, a vacation of not less than two weeks each year and for such further period of time as the duties, responsibilities, of service and other qualifications of an employee may warrant. Such time as the executive head of the department or any officer having supervision over said employee may fix, and for such time they shall be allowed the same compensation as if actually employed except that no such vacation shall be granted to per diem employees.

conduct.

Officers and employees; leave of absence without pay.
 § 1569-b. Except as otherwise specially provided for by the
 a city department or any other law, the provisions of this section shall apply to all

v. Cahill, 188 N. Y. 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012,

Compensation of coroner's stenographers.
The provisions of the Consolidated

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City employees; vacations regulated. (New.)

§ 1567. The executive heads of the various departments are au-
thorized and empowered to grant to every employee of the city of
New York or of any department

Per diem city employees; leave of absence with pay.

§ 1568. The head of a city department, or any other officer, bo
or body of the city, or of a borough or county within the city, vested
with the power of appointment and employment, in addition to
existing powers, may, in his discretion, grant to an employee in his
department, board, body or office, whose compensation is payable
by the day and who may be injured in the performance of his duties
a leave of absence during disability with pay, which leave of absence
however, shall not exceed thirty days except with the consent of the
mayor and the comptroller. (*Added by L. 1912, ch. 353.*)

for longer than two weeks and only during the month of June, July and August. (*As amended by L. 1910, ch. 679.*)

See L. 1909, ch. 559.

§ 1571. Coroners; officers and subordinates provided for; salaries and compensation. (See 3d Ed., p. 1017.)

Appointment of status of clerks and physicians.

This section makes it the duty of each coroner on assuming office to appoint a coroner's physician. The appointment of such physician is personal to each coroner, and his term of office is coterminous with that of the coroner who appoints him unless he be sooner removed. *Matter of Nammack*, 145 App. Div. 289, rev'g 66 Misc. 523, 123 N. Y. Supp. 1063; *Matter of Flynn*, 65 Misc. 233, 119 N. Y. Supp. 930.

The power vested in the coroner to appoint a coroner's position is exhausted when the power of appointment has been once exercised and a later and further appointment of another person to the same position is ineffectual. *Matter of Flynn*, 65 Misc. 233, 119 N. Y. Supp. 930.

The coroner cannot by temporarily assigning certain duties to his clerk transform his position to that of a private secretary, cashier or deputy and thereby deprive him of the benefit of the Civil Service Law protecting veterans from removal except for cause after hearing had. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, rev'g 116 App. Div. 885, 102 N. Y. Supp. 325. But compare *People ex rel. Schulum v. Harburger*, 132 App. Div. 260, 116 N. Y. Supp. 994.

The provisions of the Civil Service Law prohibiting the removal of veterans or volunteer firemen except for cause after hearing had, applies to the position of clerk to the coroner. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, rev'g 116 App. Div. 885, 102 N. Y. Supp. 325.

Compensation of coroner's stenographers.

The provisions of the Consolidation Act, L. 1882, ch. 410, § 1768, fixing the salary of a coroner's stenographer at \$2,500 a year was superseded by the provisions of § 56, *ante*, giving the board of estimate and the board of aldermen the power to fix the salaries of all city officers and employees, whose salaries are payable out of the city treasury. *Hamburger v. Board of Estimate*, 109 App. Div. 427, 96 N. Y. Supp. 130. Appeal dismissed in 184 N. Y. 7.

The power conferred upon the board of estimate and the board of aldermen under § 56, *ante*, to fix the salary of a coroner's stenographer, held not to have superseded the provisions of the Consolidation Act, L. 1882, ch. 410, § 1768, providing that coroner's stenographers shall receive six cents per

folio for all transcripts made for the use of the district attorney's office. *Hamburger v. City of New York*, 66 Misc. 175, 121 N. Y. Supp. 316.

§ 1586. Devolution of powers vested in boards of supervisors in New York, Kings, Queens and Richmond counties.
(See 3d Ed., p. 1022.)

The power to designate newspapers to publish election notices and canvasses conferred by § 22 of the County Law upon the supervisors of the county has not been transferred to the board of elections but is vested by this section in the board of aldermen. *Standard Pub. Co. v. City of New York*, 111 App. Div. 260, 97 N. Y. Supp. 740.

§ 1587. The office of county treasurer in the counties of Kings, Queens and Richmond abolished. (See 3d Ed., p. 1022.)

See *People v. Keenan*, 110 App. Div. 537, 97 N. Y. Supp. 77, *aff'd* 185 N. Y. 600.

§ 1614. Existing rights and remedies preserved. (See 3d Ed., p. 1028.)

The defense that the city has been sued under an improper title is not available where the city has voluntarily appeared and submitted itself to the jurisdiction of the court. *Vaccarini v. City of New York*, 54 Misc. 600, 104 N. Y. Supp. 938.

APPENDIX I

AMENDMENTS TO

NEW YORK CITY CONSOLIDATION ACT (L. 1882, ch. 410, CONTINUED IN FORCE BY GREATER NEW YORK CHARTER, SEC. 1610)

MADE BY THE LEGISLATURE SUBSEQUENT TO 1906 TO AND INCLUDING THE YEAR 1911

§§ 1108 and 1109. Tax to be raised for additional annual compensation of justices of the Supreme Court resident in the first district and justices from other districts assigned to first district.

Repealed by the Judiciary Law of the Con. Laws, L. 1909, ch. 35, § 800.

District attorney; salary; residence; assistants.

§ 1503. The district attorney of the county of New York shall receive for his services as such district attorney a yearly salary of fifteen thousand dollars and shall be paid in equal monthly payments. There shall be fourteen assistant district attorneys for said county, who shall each receive a yearly salary of seven thousand five hundred dollars. The office is so far local as to require the residence of the district attorney and his assistants within the county. (*As amended by L. 1911, ch. 516*).

§ 1515. Court of general sessions; division into parts.

Repealed by L. 1907, ch. 412.

§ 1516. Id; by whom held.

Repealed by L. 1907, ch. 412.

§ 1517. Terms; duration and extra terms.

Repealed by L. 1907, ch. 412.

§ 1519. Recorder; election of.

Repealed by L. 1907, ch. 412.

§ 1521. City judge; election; powers; salary.

Repealed by L. 1907, ch. 412.

§ 1522. Id; office; time of attendance thereat.

Repealed by L. 1907, ch. 412.

§ 1523. Judges of general sessions; election; jurisdiction; salary.

Repealed by L. 1907, ch. 412.

§ 1525. Common pleas judges may hold court of sessions.

Repealed by L. 1907, ch. 412.

Court may make rules for its own conduct.

§ 1537. The court of general sessions shall have power at all times to make rules and regulations for its government and conduct and for the practice therein, and to enforce the same by imprisonment for contempt, or by fine, or by both. It is a court of record. The clerk of the court of general sessions acting under the direction of the court shall make and keep a calendar which shall include all indictments in said court upon which issue shall have been joined by a defendant's plea, including those which may have been removed from the supreme court. Said indictments shall be placed on the calendar in the order of the dates of joinder of issue, and shall remain upon said calendar until disposed of in said court or until removed to the supreme court according to law. Every case shall be called when reached on said calendar, and the time and place of trial shall be under the control and regulation of said court of general sessions, which court shall make and enforce rules and regulations for the making and keeping of said calendars, for preferences thereon, for postponements, for assignment of causes to the various parts of said court, and for all matters incident to the calendar practice. Criminal causes in the supreme court shall be subject to the control and regulation of that court as to precedence, postponement and time of trial. (*As amended by L. 1909, ch. 542*).

Grand jurors; how and by whom selected; certain designated officers to constitute a board.

§ 1638. The persons to serve as grand jurors at the terms of the supreme court for the trial of criminal actions, and at the terms of the

court of general sessions, to be held in the county of New York, shall be selected from the persons whose names are contained in the lists of trial jurors for the time being for said county by a board to consist of the presiding justice of the appellate division of the supreme court in the first department, the mayor of the city of New York, an associate justice of the said appellate division of the supreme court to be designated by the resident members of such appellate division, and two judges of the court of general sessions to be designated by the judges of the court of general sessions; the designations hereinbefore mentioned to be made by the said justices of the appellate division, and by the judges of the court of general sessions, respectively, in writing, and filed in the office of the clerk of the city and county of New York on or before the first day of November in each and every year. If the said designations, or either of them, shall not be made and filed before the expiration of the time hereinbefore specified therefor, the same may be made and filed at the earliest convenient time thereafter, with the same force and effect as if made and filed before the expiration of the time above specified. (*As amended by L. 1910, ch. 549.*)

Board meetings and quorum.

§ 1639. The said board shall meet at the office of the commissioner of jurors in the county of New York on the last Monday of November in every year. The presiding justice of the appellate division of the supreme court in the first department shall act as chairman; in case of the absence of said presiding justice, the members present, if a quorum, shall elect one of their number as chairman. Three members shall constitute a quorum for the transaction of business, and if a quorum be not present, the board shall adjourn from day to day until a quorum is obtained. (*As amended by L. 1910, ch. 549.*)

Selection of persons to serve as jurors and list to be made.

§ 1641. The said board shall, within fifteen days after the first meeting, select from the list produced by the commissioner of jurors of persons qualified to serve as jurors in said county, a list of the names of not less than six hundred nor more than twelve hundred persons, to serve as grand jurors of the different terms of the supreme court for the trial of criminal actions and of the courts of general sessions, to be held in said county, until the next list shall be prepared, and the names thereon deposited as hereinafter mentioned. The persons so selected shall be intelligent citizens, of good character, and shall be, so far as the said board may be informed, possessed of the qualifications by law required of persons to serve as jurors for the

trial of issues of fact, and not exempted from serving as such jurors. (*As amended by L. 1910, ch. 549.*)

No person to serve unless included in list.

§ 1645. No person shall be summoned to serve as a grand juror at any term of the supreme court for the trial of criminal actions or of the court of general sessions held in the county of New York, except his name shall be included in the list of grand jurors for the time being, selected pursuant to the foregoing sections. (*As amended by L. 1910, ch. 549.*)

Summoning; fines for non-attendance.

§ 1648. Grand jurors shall be summoned in the same manner as petit jurors, and the fines imposed on grand jurors for non-attendance shall not be less than fifty dollars nor more than two hundred and fifty dollars, and the same shall be collected or remitted in the same manner as is provided by law in respect to petit jurors. The ballots shall be prepared by the commissioner of jurors, and after being carefully compared with the lists regularly selected, shall be placed on the grand jury box. For the supreme court, in the county of New York, when an order to draw a grand jury is made, unless such order shall otherwise direct, and for the court of general sessions unless an order made by a judge authorized to hold a term of said court, shall otherwise direct, fifty jurors shall be drawn for each grand jury on the same day that the petit jurors, to be empaneled on the same day as such grand jurors are drawn. (*As amended by L. 1910, ch. 549.*)

Drawing of grand jurors.

§ 1649. Grand jurors for the said courts shall be drawn by the commissioner of jurors in and for the county of New York or one of his assistants, in the presence and with the assistance of the county clerk, or his deputy, the sheriff or under sheriff of said county and one or more judges of a court of record elected in said county. Notice of the time and place of the drawing of each such grand jury shall be given by the said commissioner of jurors to the said county clerk and sheriff and to the clerk of the said court of general sessions and to one or more judges of a court of record elected in said county. Each such grand jury shall be drawn by drawing from the grand jury box so many of the ballots placed therein as above provided, as shall equal in number the grand jury to be drawn. A minute of such drawing shall be kept, containing the names of the persons drawn and specifying for what court and what term they were drawn, which minute must be certified by the officer drawing the same and the officers and judges in whose presence as attending officers and judges for that

purpose such drawing was made, and filed in the office of the commissioner of jurors in said county. (*As amended by L. 1911, ch. 85.*)

Coroners; clerks to coroners to issue permits; interference with bodies, when misdemeanor.

§ 1776. Subdivision 1. The clerk in attendance at the coroner's office, during the absence of all the coroners therefrom shall issue a permit or order authorizing the removal of a body of anyone who shall have died in the manner described in the last section but two, for the purpose of taking charge thereof until the certificate is granted by the coroner for burial.

Subdivision 2. Any person except the coroner who shall wilfully touch, remove, disturb or embalm the body of anyone who shall have died in the manner described in the last section but two, or who shall wilfully touch or remove or disturb the clothing or any article upon or near such body without an order from the coroner, or clerk in attendance at the coroner's office, shall upon conviction be adjudged guilty of a misdemeanor and shall be punished by imprisonment in the county prison not exceeding one year or by a fine not exceeding five hundred dollars or by both such fine and imprisonment. (*As amended by L. 1908, ch. 84.*)

§§ 1839-1844. Provisions concerning elections in the city of New York.

Repealed by Election Law of the Con. Laws, L. 1909, ch. 22, § 570.

§§ 1846-1848. Books of registry; election districts and chief of bureau of elections.

Repealed by Election Law of the Con. Laws, L. 1909, ch. 22, § 570.

§§ 1850-1861. Inspectors of election; poll clerks; appointment of and duties at elections.

Repealed by Election Law of the Con. Laws, L. 1909, ch. 22, § 570.

§§ 1864-1866. Books of registration of electors.

Repealed by Election Law of the Con. Laws, L. 1909, ch. 22, § 570.

§§ 1868-1929 and 1931. Additional provisions as to rights and duties of voters at elections.

Repealed by Election Law of the Con. Laws, L. 1909, ch. 22, § 570.

No one to board vessel with intent to supply liquor to crew.

§ 2070. It shall not be lawful for any person to board or attempt to board any vessel arriving in or lying or being in the harbor or port of

New York, with intent to supply liquors by sale, gift or otherwise, directly or indirectly, to any member of the crew employed on board of such vessel. (*As amended by L. 1909, ch. 353.*)

Unlawful to remain on vessel after having been ordered to leave.

§ 2071. It shall not be lawful for any person having boarded any vessel in the port of New York, to neglect or refuse to leave said vessel after having been ordered so to do by the master or person having charge of such vessel. (*As amended by L. 1909, ch. 353.*)

Board of commissioners for licensing sailors' boarding houses; how constituted.

§ 2074. There is created a board denominated a board of commissioners for licensing sailors' hotels or boarding houses in the city of New York consisting of one person selected by each of the following corporate bodies or associations, respectively, to wit: The Chamber of Commerce of the State of New York; the American Seamen's Friend Society in New York; the New York Board of Underwriters; the Marine Society of New York; the Society for Promoting the Gospel Among Seamen in the Port of New York; the New York Maritime Association of the Port of New York; the Seamen's Church Institute of New York; the Seamen's Christian Association of the city of New York, and St. Peter's Union for Catholic Seamen. (*As amended by L. 1909, ch. 353.*)

Licensing sailors' boarding houses.

§ 2075. Such board shall take the application of any person applying for a license to keep a sailors' boarding-house, or sailors' hotel, in the city of New York, and upon satisfactory evidence to them of the respectability and competency of such applicant, and of the suitability of his accommodations, shall issue to him a license, which shall run to the first Tuesday of May next ensuing the date thereof and no longer, unless sooner revoked by said board, to keep a sailors' boarding-house in the city and to invite and solicit boarders for the same within the limitations of the state and federal laws relating thereto. (*As amended by L. 1909, ch. 353.*)

Revocation of licenses.

§ 2076. Such board may, upon satisfactory evidence of the disorderly character of any sailors' hotel or boarding-house, licensed as hereinbefore provided, or of the keeper or proprietor of any such house, or of any force, fraud, deceit, or misrepresentation in inviting

or soliciting boarders or lodgers for such house, on the part of such keeper or proprietor, or of any of his agents, runners, or employees, or of any attempt to persuade or entice or force any of the crew to desert from or to serve involuntarily on any vessel in the harbor of New York, by such keeper or proprietor, or any of his agents, runners, or employees, revoke the license for keeping such house after notice to the licensee and a hearing thereon and each member of said board is hereby authorized to administer oaths and take and receive evidence in all matters provided for herein. (*As amended by L. 1909, ch. 353.*)

Fees for licenses and application thereof; reports to be filed.

§ 2077. Every person receiving the license hereinbefore provided for shall pay to the board of commissioners aforesaid the sum of twenty-five dollars for each full year and a proportionate amount for a shorter period which amounts after deducting the actual expenses of said board incurred in the transaction of the business shall be by them applied for the relief of shipwrecked and destitute seamen. Said board shall file on or before the second Monday of January of each year, in the office of the clerk of the city and county of New York, a statement showing the number of licenses issued, the names of persons to whom issued, with name and number of the street or house licensed during the year preceding, the amount of money received therefor, the amount and items of their disbursements, and the amount distributed by them as hereinbefore directed. (*As amended by L. 1909, ch. 353.*)

Penalties for violations of foregoing sections; commissioners of boarding-houses not to accept any gratuities, etc.

§ 2082. Whoever shall offend against any or either of the provisions contained in sections two thousand and sixty-nine to two thousand and seventy-three, inclusive, or two thousand and eighty or two thousand and eighty-one, of this act, and any commissioner appointed under this chapter who shall directly or indirectly receive any gratuity or reward, other than as herein provided for, or on account of any license under this chapter shall be deemed guilty of a misdemeanor. (*As amended by L. 1909, ch. 353.*)

Vessel, sailor, seamen, boarding-house, and hotel; defined.

§ 2083. The word "vessel," as used in this chapter shall include vessels by whatever power propelled. The word "sailor" and the word "seamen" as used in this chapter shall include any person not an officer employed on any vessel. The word "boarding-house" as used in this chapter shall include a house where both board and lodg-

ings are given or a house where lodgings alone are given. The word "hotel" as used in this chapter shall include a house where lodgings alone are given or a house where both board and lodgings are given. (*As amended by L. 1909, ch. 353.*)

Appointment of Hell Gate pilots; from among apprentices passing examination.

§ 2125. All pilots hereafter to be appointed shall be appointed by the governor by and with the consent of the senate, and shall be commissioned by the governor in like manner as all other persons appointed to office by him, with the consent of the senate. There shall hereafter be apprentices who shall serve a continuous apprenticeship of not less than two years, with a pilot on duty, and shall be eligible for appointment only when a vacancy occurs caused by the death of a pilot, and shall continue to serve until there is a vacancy. When a vacancy occurs provided any of the apprentices shall have served the required time they shall be examined as to their fitness for appointment by the board of port wardens with the assistance of two or more Hell Gate pilots, which examination shall be held at all times in the office of said board. If said examination shall prove satisfactory, the board of wardens shall make a list of the person or persons who have passed said examination, and when a vacancy occurs, the board of wardens shall select from said list the person or persons to be recommended for appointment as Hell Gate pilots which list shall be transmitted to the governor of this state whose duty it shall be to present the same to the senate for confirmation or rejection. And the indentures of all apprentices under this act shall be filed in the office of the board of wardens within ten days after the same shall be executed. (*As amended by L. 1909, ch. 581.*)

APPENDIX II

L. 1905, CH. 724, AS AMENDED TO AND INCLUDING THE YEAR 1911.

"An act to provide for an additional supply of pure and wholesome water for the city of New York; and for the acquisition of lands or interest therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects."

Accepted by the city.

Became a law, June 3, 1905, with the approval of the Governor.

Passed by a two-thirds vote.

NOTE.—This statute is reprinted in full as it applies to the city of New York and must be consulted in connection with the existing provisions of the Greater New York charter, §§ 483–508, inclusive, as it affects those sections and by implication, displaces some of them. (See 3d Ed., pp. 351–367 inclusive and pp. 180, *et seq. ante.*)

Board of water supply of the city of New York; appointment, terms and qualifications of; organization of board.

§ 1. The mayor of the city of New York shall appoint three persons who shall be commissioners for the purposes hereinafter specified. The persons so to be appointed shall be public officers and shall constitute a board or commission to be called the board of water supply of the city of New York. Every member of this board shall during his term of office be a resident of the city of New York. Each of the commissioners shall be entitled to receive a salary of twelve thousand dollars per year, and shall hold no other federal, state or municipal office, except the office of notary public or commissioner of deeds. The board shall have the power to appoint a president from among its own members and to adopt a seal and by-laws regulating the transaction of its business. The board shall also have power to select and appoint a secretary, and such engineers, surveyors, draughtsmen, stenographers, clerks and employees as may be necessary, and to fix their compensation and in addition to the powers hereinafter specifically conferred shall have such further powers as

may be requisite to the efficient performance of the duties imposed upon it by this act. Two members shall constitute a quorum of said board for the transaction of all business of the board. All contracts and other papers to be executed pursuant to a resolution adopted by the board, may be executed in the name of the board, and under its seal and attested by the signature of its president or secretary or of any member of the board duly authorized by resolution so to do. The corporation counsel of the city of New York shall be the attorney at law for, and legal advisor of, the board, and shall, upon its request, either personally or through such of his assistants or other counsel as he may designate, furnish it with advice and aid, in a similar manner as he is required by law to do in the case of the departments, boards and officers of the city of New York. No member of said board shall be removed except for incompetency or misconduct shown after a hearing upon due notice, upon stated charges.

Duties of board; investigation of sources of additional water supply; reports.

§ 2. It shall be the duty of the board to proceed immediately and with all reasonable speed, to ascertain what sources exist and are most available, desirable and best for an additional supply of pure and wholesome water for the city of New York. The board shall make such surveys, maps, plans, specifications, estimates and investigations as it may deem proper in order to ascertain the facts as to the said sources and shall report to the board of estimate and apportionment with recommendations as to what action should in its opinion be taken with reference thereto, so that the board of water supply and the board of estimate and apportionment may be enabled to determine from what source or sources and in what manner the city of New York may best secure an additional supply of pure and wholesome water. It shall not be necessary that the project contemplated by this act shall be acted on by or under one report, or at one time, but it shall be lawful for the said boards to report upon, consider and determine the project in parts or sections from time to time as the said boards may deem fit, so that the city may be able to obtain an additional supply of water from one or more sources before the whole additional supply contemplated may be obtained.

Modification or rejection of reports; preparation of further reports, maps and surveys; adoption of maps; notice of service of; final map and plans; execution and filing of.

§ 3. The board of estimate and apportionment upon the receipt of the said report or reports of the board of water supply may adopt,

modify or reject the whole or any part of the same, and may cause such surveys to be made, and such further information to be obtained as it shall deem expedient to enable it to act intelligently in the premises. In case of the modification or rejection of the recommendations in said report or reports or any part thereof by the board of estimate and apportionment, the board of water supply in like manner as aforesaid shall prepare and submit to the board of estimate and apportionment a further report or reports, surveys, maps, plans, specifications, estimates and investigations and make such changes and modifications as shall seem proper to the board of estimate and apportionment, and shall continue so to do under the direction of the board of estimate and apportionment, until a map, plan or plans, covering the entire work contemplated by this act shall be approved and adopted by the board of estimate and apportionment. The said map, plan or plans may be made and adopted in parts or sections from time to time and may be changed or modified either before or after adoption as the board of estimate and apportionment may deem necessary for the more efficient carrying out of the provisions of this act. The board of estimate and apportionment prior to the adoption of such map, plan or plans, or to a modification thereof shall afford to all persons interested a reasonable opportunity to be heard respecting the same and shall give reasonable public notice of such hearing whereat testimony may be produced by the parties appearing in such manner as the board of estimate and apportionment may determine, and each member of the said board is hereby authorized to administer oaths and issue subpoenas in any proceeding pending before them under this act. Notice of such hearing shall be given in addition to the above provision by mailing to the chairman and clerk of the board of supervisors of the county where the real estate to be acquired is situated, a notice of such hearing at least eight days before the time named in said notice. A final map, plan or plans approved and adopted by the board of estimate and apportionment shall be executed in quadruplicate, one of which shall remain on file with the clerk of the board of estimate and apportionment, one shall be placed on file in the office of the board of water supply, one or a certified copy thereof shall be filed in the county clerk's office or register's office of each county in which any of the land affected thereby is situated, and one copy, or a certified copy thereof, shall be filed in the office of the commissioner of water supply, gas and electricity. provided, however, that no reservoir, or other structure for the storage or impounding of water, shall at any time be constructed within the drainage area of the Esopus creek in the county of Ulster, other than that designated in the reports of William H. Burr, Rudolph

Hering, and John R. Freeman to the Honorable George B. McClellan, mayor, chairman, board of estimate and apportionment of the city of New York, as to the Ashokan reservoir, the flow line of which shall not exceed elevation six hundred feet coast and geodetic survey datum. (*As amended by L. 1906, ch. 314*).

See Matter of Simmons, 58 Misc. 581, 109 N. Y. Supp. 1036, aff'd 130 App. Div. 350, 114 N. Y. Supp. 571, aff'd 195 N. Y. 573.

Authority of board to enter on lands and water to make surveys and examinations.

§ 4. The board of water supply, its agents, engineers, surveyors and such other persons as may be necessary to enable it to perform its duties under this act, are hereby authorized to enter upon any land, or water for the purpose of making surveys, examinations or investigations and preparing the maps, plans and reports contemplated by this act, and for the purpose of posting any notices that may be required to be published in like manner.

Submission of maps and plans to board of estimate and apportionment; maps, contents of; maps may be filed in sections; proceedings may be taken separately on each section; proceedings in case of rejection.

§ 5. After the approval, adoption and filing of a final map, plan or plans described in section three of this act, the board of water supply shall prepare and submit to the board of estimate and apportionment six similar maps or plans of the proposed sites of the proposed dams, reservoirs, aqueducts, sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, ventilating shafts, filters, and other works of construction and the appurtenances thereof. Upon those maps there shall be laid out and numbered the various parcels of real estate on, over or through which the same are to be constructed and maintained, or which may be necessary for the prosecution of the work authorized by this act. On said maps the natural and artificial division lines existing on the surface of the soil at the time of the survey shall be delineated, and there shall be plainly indicated thereon of which parcels the fee, and over or through which parcels the right to use and occupy the same in perpetuity, is to be acquired. The board of estimate and apportionment may adopt, modify or reject said maps in whole or in part, and require others to be made instead thereof. The said maps may be made and filed in sections. One or more sections may be determined before the maps of the whole construction are completed. The said sections shall be determined and

decided upon previous to the appointment of the commissioners as hereinafter provided for, and shall be so determined that one set of commissioners shall not be appointed upon a section covering more property than can reasonably be passed upon and awards made by said commissioners within the limits of a year from the time of the filing of the oaths as hereinafter provided. The proceedings hereinafter authorized may in like manner be taken separately in reference to one or more of such sections before the maps of the whole are filed. The work upon one or more of such sections may be begun before the maps of the remaining sections are filed. In case of such rejection the board of water supply shall in like manner as aforesaid, prepare and submit others, until maps shall be approved by the board of estimate and apportionment covering the entire area required for the construction, maintenance and operation of such aqueducts, dams, reservoirs, culverts, sluices, canals, bridges, tunnels, pumping works, blow-offs, shafts, filters and appurtenances according to the maps, plan or plans, theretofore by the said board of estimate and apportionment approved. The maps when adopted by the said board of estimate and apportionment shall be by said board transmitted to the corporation counsel, with a certificate of such approval written thereon and signed by a majority of the board of estimate and apportionment.

See Matter of Board of Water Supply, 74 Misc. 146.

Maps where to be filed.

§ 6. The corporation counsel of the city of New York shall cause one of said maps described in the previous section, or a certified copy thereof, to be filed in the office of the clerk of each county in which any real estate laid out on said map shall be located except that in any county in which there is a register's office, the said map shall be filed therein instead of in the office of the county clerk. The other maps described in the previous section shall be disposed of in the manner indicated in succeeding sections of this act.

Application for appointment of commissioners of appraisal; contents of petition.

§ 7. After the said maps shall have been filed as provided for in the preceding section the corporation counsel, for and on behalf of the city of New York, shall, upon first giving the notice required in the next section, of this act, apply to the supreme court at any special term thereof to be held in the judicial district in which the lands or some part thereof shown on the said maps, and the title to which it

is proposed to acquire in the proceeding thus instituted, is situated, for the appointment of commissioners of appraisal. Upon such application he shall present to the court a petition signed and verified by one of the board of water supply duly authorized by the said board so to do, according to the practice of the court, setting forth the action theretofore taken by the board of water supply and by the board of estimate and apportionment, and the filing of such maps, and praying for the appointment of commissioners of appraisal. Such petition shall contain a general description of all the real estate to, in, or over which any title, interest, right or easement is sought to be acquired for the said city for the purposes of this act, each parcel being more particularly described by a reference to the number of said parcel as given on said maps, and the title, interest or easement sought to be acquired to, in or over such parcel, whether a fee or otherwise shall be stated in the petition.

Notice of application for appointment of commissioners; what to specify.

§ 8. The corporation counsel shall give notice in the City Record, and in two public newspapers published in the city of New York, and in two public newspapers published in each other county in which any real estate laid out on said maps may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to the said court for the appointment of commissioners of appraisal, which notice shall specify the time and place of such application, shall briefly state the object of the applications and shall describe the real estate sought to be taken or affected. A statement of the boundaries of the dams, reservoirs, sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, filters and ventilating shafts and of the route of the tunnels and aqueducts by courses and distances, and of the greatest and least width of its tract, with separate enumerations of the numbers of the parcels to be taken in feet, and of the numbers of the parcels in which an easement is to be acquired, with a reference to the dates and places of filing the said maps, shall be sufficient description of the real estate sought to be so taken or affected. Such notice shall be so published continuously in each issue of the newspaper for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to the said advertisement cause copies of the same in hand bills to be posted up, for the same space of time, in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected.

See Matter of Board of Water Supply, 74 Misc. 146.

Hearing application; order for appointment of commissioners.

§ 9. At the time and place mentioned in said notice, unless the said court shall adjourn such application to a subsequent day and in that event at the time to which the same may be adjourned, the court upon due proof to its satisfaction of the publication and posting aforesaid, and upon filing the said petition, shall make an order for the appointment of three disinterested and competent freeholders, at least one of whom shall reside in the county of New York, and at least one of whom shall reside in the county or one of the counties in which the said real estate shall be situated, as commissioners of appraisal to ascertain and appraise the compensation to be made to the owners and all persons interested in the real estate laid down on said maps as proposed to be taken or affected for the purposes indicated in this act. Such order shall fix the time and place for the first meeting of the said commissioners.

See *In re Bensel*, 66 Misc. 199, 121 N. Y. Supp. 361.

Commissioners to take oath of office.

§ 10. The said commissioners shall take and subscribe the oath or affirmation required by article thirteen of the constitution and shall forthwith file the same or a certified copy thereof in the office of the clerk of the county in which the land or any part thereof is situated, and shall forthwith file certified copies of the said oaths in the office of the clerk of the county of New York, and in the register's office in any county in which there is a register's office and in which is situated any of the real estate sought to be taken or affected by the proceeding.

When city acquires fee to parcels of land in fifth section; possession and entry by city.

§ 11. On filing the said oath, in the manner provided in the previous section, the city of New York shall be and become seized in fee of all those parcels of real estate which are on the maps in the fifth section referred to described as parcels, of which it has been determined that the fee should be acquired; and may immediately or at any time or times thereafter take possession of the same or any part or parts thereof without any suit or proceeding at law for that purpose; provided however that before the city of New York takes possession of the same it shall pay to the respective owner or owners of each of said parcels of real estate, a sum of money equal to one-half the assessed valuation of said real property as the same appears upon the assessment roll of the town in which the same is situate for the year nineteen hundred and five. Deposit of the money to the credit

of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this section, and, thereupon, the board of water supply of the city of New York, or any person or persons acting under their or its authority may enter upon and use and occupy in perpetuity all the parcels of real estate described in said map for the purpose of constructing and maintaining on, in, under, or over the same, the said aqueducts, dams, and reservoirs, with the said blow-offs, sluices, culverts, bridges, tunnels, ventilating shafts, filters and other appurtenances, provided however, that no buildings or improvements shall be removed or disturbed within one year from the date of the filing of the oaths of the commissioners unless notice is given to the owner of ten days, or to his attorney, of the intention to make such removal, and affording him an opportunity to examine the property with the commissioners and such witnesses as he may desire. If the owner of the property cannot be found with due diligence, and there is no attorney representing the said property or parcel, before removing, disturbing or destroying any of the buildings, or the improvements, the representative of the boards referred to in this act or the corporation counsel shall cause measurements to be made of the buildings and photographs of the exterior views thereof, which measurements and photographs shall be at the disposition thereafter of the claimants, or their attorneys, in case such claimants or attorneys should appear and demand the same before the case is tried. (*As amended by L. 1906, ch. 314.*)

See *Stewart v. Briggs*, 138 App. Div. 701, 123 N. Y. Supp. 803; *Matter of Bensel*, 140 App. Div. 257, 125 N. Y. Supp. 128; *In re Simmons*, 116 N. Y. Supp. 439.

Powers of commissioner to administer oaths and subpoena witnesses; meetings and adjournments of commission; vacancies in commission how filled; hearing proofs, etc., of owners of real estate on fourth, fifth and sixth maps; compensation for land acquired.

§ 12. Any one of said commissioners of appraisal may issue subpoenas and administer oaths to witnesses; and they or any one of them in the absence of the others may adjourn the proceedings from time to time in their discretion, but they shall continue to meet from time to time as may be necessary to hear, consider and determine upon all claims which may be presented to them under the provisions of this act. In case of the death, resignation, refusal or neglect to serve of any commissioner of appraisal, the remaining commissioner or commissioners shall upon ten days' notice to be given by adver-

tisement in the newspapers designated as hereinbefore provided, apply to the supreme court at a special term thereof, to be held in the judicial district in which the land or any part thereof, title to which is to be acquired in the proceeding, is situated, for the appointment of one or more commissioners to fill the vacancy or vacancies so occasioned. In case of the death, resignation or refusal to serve of all the commissioners of appraisal, the corporation counsel shall on giving the notice required in this section apply to the said court for the appointment of other commissioners of appraisal. It shall be the duty of the commissioners of appraisal to procure from the corporation counsel the fourth, fifth and sixth copies of the maps hereinbefore provided for. They shall view the real estate laid down on said maps and shall hear the proofs and allegations of any owner, lessee, or other person in any way entitled to or interested in said real estate or any part or parcel thereof, and also such proofs and allegations as may be offered on behalf of the city of New York. They shall reduce the testimony, if any, taken before them, to writing and after the testimony is closed, they or a majority of them, all having considered the same, and having an opportunity to be present, shall without unnecessary delay, ascertain and determine the just and equitable compensation which ought justly to be made by the city of New York to the owners or the persons interested in the real estate sought to be acquired or affected by said proceedings, including just and equitable compensation to the owner of any leasehold taken or affected in this proceeding. The said commissioners of appraisal shall make reports of their proceedings to the supreme court as in the next section provided, with the minutes of the testimony taken by them, if any; and they shall be entitled to the payments hereinafter provided for their services and expenses to be paid from the fund hereinafter provided.

See *Matter of Simmons*, 130 App. Div. 350, 114 N. Y. Supp. 571 aff'd 58 Misc. 581, 109 N. Y. Supp. 1036 aff'd 195 N. Y. 573; *Id.*, 139 App. Div. 273, 123 N. Y. Supp. 1034; *Id.*, 141 App. Div. 120, 125 N. Y. Supp. 697; *Id.*, 146 App. Div. 329, 130 N. Y. Supp. 773; *Id.*, 68 Misc. 65, 124 N. Y. Supp. 744; *Id.*, 68 Misc. 68, 124 N. Y. Supp. 743; *Id.*, 116 N. Y. Supp. 439; *Matter of Monroe*, 131 App. Div. 872, 116 N. Y. Supp. 334 aff'd 200 N. Y. 511; *In re Bense*, 140 App. Div. 806, 125 N. Y. Supp. 872; *Id.*, 144 App. Div. 751, 129 N. Y. Supp. 682; *In re Board of Water Supply of City of New York*, 73 Misc. 231, 130 N. Y. Supp. 997.

Report, contents of; compensation for loss or damage to steam railroads; allowances for expenses and disbursements.

§ 13. The said commissioners shall prepare a report, and copies thereof as may be required to which shall be respectively annexed the

fourth and fifth, and if required, the sixth copies of the map or maps referred to in the previous sections of this act. The said reports shall contain a brief description of the several parcels of real estate so acquired, taken or affected, with a reference to the map or maps as showing the exact location and boundaries of each parcel; a statement of the sum estimated and determined upon by them as a just and equitable compensation to be made by the city to the owners or persons entitled to or interested in each parcel so taken, or as to which any right, title, interest, privilege or easement is taken, acquired or extinguished; and a statement of the respective owners or persons entitled thereto, or interested therein, but in all and each and every case and cases where the owners and parties interested, or their respective estates or interests are unknown, or not fully known to the commissioners of appraisal, it shall be sufficient for them to set forth and state in general terms the respective sums to be allowed and paid to the owners of, and parties interested therein generally, without specifying the name of estates or interests of such owners, or parties interested, or any or either of them. Where loss, damage or expense, direct or consequential, has resulted to any duly incorporated railroad corporation, operating a steam railroad in any county in which land shall be acquired in pursuance of the provisions of this act, or by reason of any of the matters in this act involved, the board of estimate and apportionment of the city of New York, is hereby authorized and empowered to agree with such railroad corporation upon the compensation which shall be made to it for such loss, damage or expense, and, when so directed by the board of estimate and apportionment, the comptroller of said city shall issue corporate stock of the city of New York in payment thereof. In the event of no agreement being reached between said board and such railroad corporation, the commissioners of appraisal appointed to estimate damages for lands acquired in such county is hereby authorized, and directed to pass upon such claim and to make awards therefor as provided in this act. They may also recommend such sums, if any, as shall seem to them proper to be allowed, to parties appearing in the proceeding, as expenses and disbursements including reasonable compensation for witnesses. They may also determine and recommend what sums if any ought to be paid to the general or special guardian of an infant, idiot, or person of unsound mind, or to an attorney appointed by the court to attend to the interests of any known owner or party in interest who has not appeared in the proceeding, for expenses or counsel fees. (*As amended by L. 1906, ch. 314.*)

See *Matter of Simmons*, 58 Misc. 581, 109 N. Y. Supp. 1036 aff'd 130 App. Div. 350, 114 N. Y. Supp. 571 aff'd 195 N. Y. 573.

Report of commission, where to be filed.

§ 14. Said report signed by said commissioners or a majority of them shall be filed not more than one year after the date of the filing of the oaths of the commissioners in the office of the clerk of a county in which the real estate sought to be acquired may be situated and in case a part of the real estate is in another county a duplicate report or certified copy shall be filed in the office of the clerk of such other county, provided, however, that the supreme court, upon application and good reasons shown therefor, may extend the time for the filing of said report beyond one year for a period not exceeding eight months. The commissioners of appraisal shall notify the corporation counsel immediately upon the filing of a report.

See *Matter of Simmons*, 140 App. Div. 244, 124 N. Y. Supp. 1129 aff'g 123 N. Y. Supp. 426, *Id.*, 116 N. Y. Supp. 439.

Notice of confirmation of report, what to specify.

§ 15. The corporation counsel, or in case of his neglect to do so within ten days after receiving notice of such filing, any person interested in the proceeding, shall give notice that the said report will be presented for confirmation to the supreme court at a special term thereof, to be held in the judicial district in which the land or a part thereof is situated at a time and place to be specified in said notice. The said notice shall contain a statement of the time and place of the filing of the report and of the copy or copies thereof, and shall be published in each of the newspapers referred to previously in this act, for at least three weeks immediately prior to the presentation of such report for confirmation.

Proceedings upon application for confirmation of report; contents of order; report, when confirmed, to be final.

§ 16. The application for the confirmation of the report shall be made to the supreme court at a special term thereof, held in the judicial district in which the land or some part thereof is situated. Upon the hearing of the application for the confirmation thereof, the said court may confirm such report or may in its discretion order that the report or any portion thereof affecting one or more parcels be referred to the same commission, or a new commission, for a new hearing, and make an order containing a recital of the substance of the proceedings in the matter of the appraisal with a general description of the real estate appraised and for which compensation is to be made; and shall also direct to whom the money is to be paid or in what bank or trust company and in what manner it shall be deposited by the comptroller of the city of New York. Such report when so

confirmed shall (except in case of an appeal, as provided in this act) be final and conclusive as well upon the city of New York as upon owners and all persons interested in or entitled to, said real estate; and also upon all other persons whomsoever.

Payment of amounts awarded by report.

§ 17. The city of New York, shall within three calendar months after the confirmation of the report of the commissioners of appraisal pay to the respective owners and bodies politic or corporation, mentioned or referred to in said report, in whose favor, any sum or sums of money shall be estimated and reported by said commissioners, the respective sum or sums so estimated and reported in their favor respectively, with lawful interest thereon from the date of filing the oath and certified copies thereof as by this act required, deducting therefrom all sums of money paid on account thereof as provided in section eleven of this act. And in case of neglect or default in the payment of the same within the time aforesaid, the respective person or persons or bodies politic or corporate in whose favor the same shall be so reported, his, her, or their executors, administrators or successors, at any time or times, after application first made by him, her, or them, to the comptroller of the city of New York for payment thereof, may sue for and recover the same, with lawful interest as aforesaid, and the costs of suit in any proper form of action against the city of New York, in any court having cognizance thereof, and it shall be sufficient to declare generally for so much money due to the plaintiff or plaintiffs therein by virtue of this act, for real estate taken or affected for the purpose herein mentioned, and the report of said commissioners, with proof of the right and title of the plaintiff or plaintiffs to the sum or sums demanded shall be conclusive evidence in such suit or action. (*As amended by L. 1906, ch. 314.*)

Payment of amounts awarded to minors and incompetent persons.

§ 18. Whenever the owner or owners, person or persons interested in any real estate taken or affected in such proceedings, or in whose favor any such sum or sums or compensation shall be so reported shall be under the age of twenty-one years, of unsound mind, or absent from the state of New York, and also in all cases where the name or names of the owner or owners, person or persons interested in any such real estate shall not be set forth or mentioned in the said report, or where the said owner or owners, person or persons being named therein, cannot upon diligent inquiry be found, or where there are adverse or conflicting claims to the moneys awarded as compensa-

tion, it shall be lawful for the city of New York to pay the sum or sums mentioned in the said report, payable, or that would be coming to such owner or owners, person or persons respectively, with interest aforesaid, into such trust company as the court may in the order of confirmation direct, to the credit of such owner or owners, person or persons, and such payment shall be as valid and effectual, in all respects as if made to the said owner or owners, person or persons interested therein respectively, themselves, according to their just rights; and provided, also, that in all and each and every such case and cases where any such sum or sums or compensation, reported by the commissioners in favor of any person or persons or party or parties, whatsoever, whether named or not named in the said report, shall be paid to any person or persons or party or parties, whomsoever, when the same shall of right belong and ought to have been paid to some other person or persons, or party or parties, it shall be lawful for the person or persons or party or parties to whom the same ought to have been paid, to sue for and recover the same with lawful interest and costs of suit as so much money had and received to his, her or their use by the person or persons, party or parties, respectively, to whom the same shall have been so paid.

Claims for compensation, when to be presented.

§ 19. Every owner or person in any way interested in any real estate taken or entered upon and used and occupied for the purposes contemplated by this act and any owner or person interested in real estate contiguous thereto and which may be affected by the construction and maintenance of said aqueducts, dams, reservoirs, sluices, canals, culverts, pumping works, bridges, tunnels, blow-offs, ventilating shafts and appurtenances, whether such contiguous real estate is shown on the maps or not, if he intends to make claim for compensation for such taking, entering upon, using or occupying, shall within three years after the appointment of the commissioners of appraisal, exhibit to the said commissioners, a statement of his claim, and shall thereupon be entitled to offer testimony and to be heard before them touching such claim and the compensation proper to be made him, and to have a determination made by such commissioners of appraisal as to the amount of such compensation. Every person neglecting or refusing to present such claim, within said time, shall be deemed to have surrendered his title or interest in such real estate or his claims for damages thereto except so far as he may be entitled as such owner or person interested to the whole or a part of the sum of money awarded by the commissioners of appraisal as a just and equitable compensation for taking, using and occupying, or

as damages for affecting the real estate owned by said person, or in which said person is interested.

See *Matter of Simmons*, 140 App. Div. 244, 124 N. Y. Supp. 1129 aff'g 123 N. Y. Supp. 426; *Id.*, 116 N. Y. Supp. 439; *Matter of Bensel*, 70 Misc. 279, 127 N. Y. Supp. 870; *In re Board of Water Supply of City of New York*, 73 Misc. 231, 130 N. Y. Supp. 997.

Protection of city of New York.

§ 20. Payment of the compensation awarded by said commissioners of appraisal to the persons named in their report (if not infants or persons of unsound mind) shall, in the absence of notice to the city of New York, of other claimants to such award, protect the city of New York.

Commissioners may make separate reports with reference to specified claims.

§ 21. Said commissioners of appraisal may, in their discretion, take up any specified claim or claims and finally ascertain and determine the compensation to be made thereon, and make a separate report with reference thereto, annexing to said report a copy of so much of the maps as displays the parcel or parcels so reported on. Such report shall, as to the claims therein specified, be the report required in this act, and the subsequent action with reference thereto shall be had in the same manner as though no other claim were embraced in said proceeding, which, however, shall continue as to all claims upon which no such determination and report is made.

Appeals when to be taken; notice of; proceedings on appeal.

§ 22. Within twenty days after notice of the confirmation of the report of the commissioners, as provided for in the sixteenth section of this act, which notice may, as to parties who have not appeared before the commissioners, be given in the manner provided in the fifteenth section of this act, either party may appeal, by notice in writing to the other party, to the supreme court, from the appraisal and report of the commissioners. Such appeal shall be heard on due notice thereof being given, according to the rules and practice of said court, either at a special term or appellate division thereof as the appellant may desire. On the hearing of such appeal, the court may direct a new appraisal and determination of any question passed upon, by the same or new commissioners, in its discretion, but from any determination of the special term an appeal may be taken to the appellate division and from any determination of the appellate division, either party, if aggrieved, may take an appeal which shall be heard and determined by the court of appeals. In the case of a new ap-

praisal, the second report shall be final and conclusive on all parties and persons interested. If the amount of compensation to be made by the said city is increased by the second report, the difference shall be paid by the comptroller of the city of New York, to the parties entitled to the same, or shall be deposited, as the court may direct; and if the amount is diminished, the difference shall be refunded to the said city of New York by the party to whom the same may have been paid, the judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same. But the taking of an appeal by any person or persons shall not operate to stay the proceedings under this act except as to the particular parcel of real estate with which the said appeal is concerned. Such appeal shall be heard upon the evidence taken before such commissioners, and any affidavits as to irregularities, and three printed copies of such evidence shall be furnished by the city of New York, to the party taking the appeal within ten days after the appeal is perfected, and such appeals may be heard on the evidence so furnished, and such appeals may be taken without security thereon.

See *Matter of Simmons*, 203 N. Y. 241 rev'g 144 App. Div. 255, 128 N. Y. Supp. 1071; *Id.*, 138 App. Div. 667, 122 N. Y. Supp. 874; *Id.*, 141 App. Div. 120, 125 N. Y. Supp. 697; *Id.*, 124 N. Y. Supp. 738.

Amendment of proceedings; removal of commissioners.

§ 23. The supreme court of the judicial district in which the real estate, or any part thereof, is situated, shall have power at any time to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, or to cause other property to be included therein and to direct such further notice to be given to any party in interest as it deems proper, and also to appoint other commissioners in place of any who shall die, or refuse or neglect to serve, or be incapable of serving or be removed. And the said court may at any time remove any of said commissioners of appraisal who, in its judgment, shall be incapable of serving or who shall for any reason in its judgment be an unfit person to serve as such commissioner. The cause of such removal shall be specified in the order making the same. If, in any particular, it shall, at any time, be found necessary to amend any pleading, proceeding, or to supply any defect therein, arising in the course of any special proceeding authorized by this act, and same may be amended or supplied in such manner as may be directed by the supreme court, which is hereby authorized to make such amendment or correction.

See *Matter of Simmons*, 140 App. Div. 244, 124 N. Y. Supp. 1129 aff'g 123 N. Y. Supp. 426; *Matter of Bensel*, 140 App. Div. 257, 125 N. Y. Supp. 128.

Acquisition of land by agreement; grants by commissioners of the land office.

Sec. 24. The board of water supply, subject to the approval of the board of estimate and apportionment of the city of New York may agree with the owners and persons interested in any real estate laid down on said maps as to the amount of compensation to be paid to such owners or persons interested for the taking or using and occupying such real estate. And in case any said real estate shall be owned, occupied or enjoyed by the people of this state or by any county, town or school district within this state, such rights, titles, interests or properties may be paid for upon agreement respectively with the commissioners of the land office, who shall act for the people of the state, with a chairman and a majority in numbers of the board of supervisors of any county who shall act for such county, and with the supervisor and commissioner of highways, of any town who shall act for such town, and with the trustees of any school district who shall act for such district. The commissioners of the land office shall have power to grant to the said city any real estate belonging to the people of this state, which may be required for the purposes indicated in this act, on such terms as may be agreed on between them and the said board of water supply, always, however, reserving and maintaining the rights of the people and riparian owners to go to the water at any point to which the same may be drawn; and if any real estate of any county, town or school district, is required by the city of New York for the purposes of this act, the majority of the board of supervisors acting for such county, or the supervisors of any such town, with the commissioners of highway therein acting for such town, or the trustees of any school district acting for such district, may grant or surrender such real estate for such compensation as may be agreed upon between such officers respectively and the board of water supply.

Term "real estate" construed; substitution of real estate used for public purposes; determination of compensation to include expense of changing route; order of confirmation to fix time of changing route.

§ 25. The term real estate as used in this act shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all water rights or privileges, and any and all easements and incorporated hereditaments and every estate, interest and right, legal and equitable, in land or water, including terms for years, and liens thereon by way of judgment, mortgages or otherwise, and also all claims for damage to such real estate. It shall also be construed to include all real estate (as the term is above defined)

heretofore or hereafter required or used for railroad, highway or other public purposes, providing the persons or corporations owning said real estate or claiming interest therein, shall be allowed the perpetual use for such purposes of the same or of such other real estate to be acquired for the purposes of this act as will afford practicable route or location for such railroad, highway or other public purpose, and in the case of a railroad, commensurate with and adapted to its needs; and provided also that such persons or corporations shall not directly or indirectly be subject to expense, loss or damage by reason of changing such route or location, but that such expense, loss or damage shall be borne by the city of New York. In case any real estate so acquired, or used for public purposes, is sought to be taken or affected for the purposes of this act there shall be designated upon the maps referred to in the previous sections thereof, and there shall be described in the petition, hereinbefore referred to, such portion of the other real estate shown on said maps and described in said petition, as it is proposed to substitute in place of the real estate then used for such railroad, highway or other public purposes. Provided, that wherever the board of water supply has heretofore located on any map filed in the office of said commission, a substituted route for any railroad, the same shall not be subsequently changed without the assent of such company. The supreme court at the special term to which said petition is presented or at such other special term as the consideration thereof may be adjourned to, shall either approve the substituted route or refer the same back to the board of water supply for alteration or amendment, and may refer the same back, with such directions or suggestions as the said court may deem advisable, and as often as necessary and until the said commissioners shall determine such substituted route as may be approved by the court; an appeal from any order made by said court at special term, under the provisions of this section, may be taken by any person or corporation interested in and aggrieved thereby to the appellate division and court of appeals, and shall be heard as a non-enumerated motion. The commissioners of appraisal, hereinbefore referred to, in determining the compensation to be made to the persons or corporations owning such real estate, or claiming interest therein, shall include in the amount of such compensation such sum as shall be sufficient to defray the expenses of making such change of route and location and of building such railroad or highway. The said commissioners of appraisal shall suggest in their report, and the court in the order confirming such report shall determine, subject to review by the appellate division, what reasonable time after payment of the awards to said persons or corporations shall be sufficient within which to complete

the work of making such change, and neither the city of New York, nor the board of water supply shall be entitled to take possession or interfere with the use for the aforesaid purposes of such real estate, before the expiration of such time. This time may be subsequently extended by the court (subject to review as aforesaid) upon a sufficient cause shown. After the expiration of this time so determined or extended no use shall be made of said real estate which shall cause pollution to the water in said reservoir or interfere with its flow.

See Matter of Bensel, 144 App. Div. 751.

Contracts and specifications; approval of.

§ 26. Upon the filing of the oath of the commissioners of appraisal in the manner hereinbefore provided, the board of water supply shall, from time to time, as it may determine, prepare and submit to the corporation counsel, forms of contracts and specifications for the doing of the work and the furnishing of the material required to be done and furnished by the said approved plan, or for the doing of such parts of said work and the furnishing of such parts of said materials as it may from time to time determine. The forms of contract, specifications and bonds for the faithful performance shall be subject to approval as to form by the corporation counsel which approval shall be endorsed thereon or attached thereto. The board of water supply is hereby given the exclusive authority to determine what provisions shall be embodied in said contracts.

Advertisement of proposals for doing the work.

§ 27. When the form of any contract with its specifications and the form of bond for the performance thereof shall have been approved as provided for in the last section, the board of water supply shall advertise for sealed bids or for proposals for the doing of the work or the furnishing of the materials called for in such approved form of contract. Said advertisement shall be published in the City Record and in two daily newspapers published in the city of New York, to be designated by the board of water supply, for at least fifteen days consecutively before the time fixed for the closing of the bid box.

Bids, presentation of; security for performance of work.

§ 28. All bids or proposals which may be sent in answer to the invitation of such advertisement shall be inclosed in a sealed envelope and delivered to the board of water supply or to such person as may be designated by it to receive the same, who shall, upon receipt thereof, forthwith and in the presence of the person offering said bid, deposit it in a box provided for the receipt thereof. But no bid or

proposal shall be so received or deposited unless at the time of such presentation there shall be deposited with the person designated as aforesaid a certified check upon a national or state bank, drawn to the order of the comptroller of the city of New York, to an amount not less than five per centum of the amount of the bond or security required by said approved form for the faithful performance of the work or furnishing of the materials required to be done or furnished. Such amount need not however, in any case exceed one hundred thousand dollars.

Opening of bids.

§ 29. After the expiration of the time limited in the advertisement the said bids or proposals shall be publicly opened by the said board of water supply and it may select the bid or proposal, the acceptance of which will in their judgment, best secure the efficient performance of the work, or they may reject any or all of such bids. In case of the rejection of all of said bids the said board of water supply shall re-advertise said contract, and shall receive and dispose of the bids tendered under such advertisement in the manner hereinbefore provided for. In case any work shall be abandoned by any contractor, or his contract terminated pursuant to the provisions thereof, it shall be readvertised and relet in the manner in this act provided for the original letting of such work.

Return of deposits; neglect to execute contracts.

§ 30. Within three days after the decision as to who shall receive the contract, the comptroller shall return all the deposits made to the persons making the same, except the deposit made by the bidder to whom the contract shall be awarded; and if the bidder to whom the contract is awarded shall refuse or neglect within ten days after due notice that the contract has been awarded, to execute the same, and furnish the security required, the amount of deposit made by him shall be forfeited to and be retained by the said city as liquidated damages for such neglect or refusal and shall be paid into the general fund of the city, but if the said bidder to whom the contract is awarded shall execute the contract, and furnish the said security within the time aforesaid, the amount of his deposit shall be returned to him.

Execution of contracts.

§ 31. The contracts, when so awarded, shall be executed in triplicate by the contractor or contractors on the one part and the board of water supply acting for the city of New York, on the other part. One of said originals shall be delivered to the contractor, and the

other two shall be filed, one in the finance department, and the other with the board of water supply. The work and materials called for by said contract shall be done and furnished under the direction and supervision, and subject to the inspection of the board of water supply, its engineers, supervisors and inspectors. No contract shall take effect until the board of water supply or a majority thereof shall certify thereon in writing that its acceptance will, in their judgment, best secure the public interests and the efficient performance of the work therein mentioned. No contract shall take effect until the employer of labor to be engaged in the construction of any of the work in this act provided for, shall give to the municipality in which such labor may be employed, a bond in the penal sum of five thousand dollars conditioned to save harmless and indemnify such municipality against any loss, expense or charge that said municipality may legally incur because of paupers or indigent employees brought in said municipality and having no settlement therein such bond to be approved by the chief executive officer of such municipality. (*As amended by L. 1906, ch. 314*).

Compensation of commissioners and employees; allowances for counsel, determination of.

§ 32. The commissioners of appraisal appointed in pursuance of this act shall receive as compensation such fees and expenses as may be taxed by the court upon notice to the corporation counsel who shall also furnish them with the necessary clerks, stenographers, surveyors and other employees. The corporation counsel of the city of New York, shall, either in person, or by such assistants or other counsel as he shall designate for the purpose, appear for and protect the interests of the city in all proceedings in court under this act including the taxation of fees, compensation and expenses and proceedings before the commissioners. The fees of the commissioners and the salaries and compensation of their employees, and their necessary traveling expenses, and all other necessary expenses, in and about the special proceedings provided by this act to be had for acquiring title or extinguishing claims for damages to real estate, and such allowances for counsel fees as may be made by order of the court shall be paid by the comptroller of the city of New York out of the funds hereinafter provided. Such fees and expenses shall not be paid until they have been taxed before a justice of the supreme court in the judicial district in which the lands or some part thereof are situated upon eight days' notice to the corporation counsel of the city of New York. Such allowances shall in no case exceed the limits prescribed by section three thousand two hundred and fifty-three of the

code of civil procedure. The salaries and compensation of the persons employed, as provided for in this act, to prepare the necessary surveys, plans and estimates and for other purposes and to direct, supervise and inspect the work required to be done under the provisions of this act, and such other expenses in and about the same as are not herein required to be under contracts let after competition, shall be paid by the comptroller of the city of New York, on the certification of the board of water supply or of such person or persons as it may designate. The compensation and expenses of such of his assistants or other counsel as the corporation counsel may designate to represent and aid him in the performance of his duties under this act, shall also be paid out of the funds hereinafter provided, and upon the certificate of the corporation counsel who shall have power to appoint such assistants or other counsel and to fix their compensation. The various sums of money growing due from time to time, under the terms of the several contracts, made for the doing of the work and furnishing the material required by this act, shall be paid by the comptroller of the city of New York, on the certification of the said board of water supply or such person or persons as it may from time to time designate.

See *Matter of Bensel*, 138 App. Div. 662, 123 N. Y. Supp. 217; *Id.*, 141 App. Div. 841, 126 N. Y. Supp. 224; *Id.*, 142 App. Div. 217, 127 N. Y. Supp. 80; *Id.*, 143 App. Div. 963; *Id.*, 124 N. Y. Supp. 716; *Id.*, 130 N. Y. Supp. 689; *Id.*, 133 N. Y. Supp. 84; *Matter of City of New York (Valley Stream)*, 140 App. Div. 203, 124 N. Y. Supp. 1053; *Matter of Simmons*, 146 App. Div. 329; *Id.*, 58 Misc. 581, 109 N. Y. Supp. 1036 *aff'd* 130 App. Div. 350, 114 N. Y. Supp. 571 *aff'd* 195 N. Y. 573; *Id.*, 61 Misc. 352, 113 N. Y. Supp. 890; *Id.*, 71 Misc. 152, 128 N. Y. Supp. 724; *Id.*, 124 N. Y. Supp. 738; *Matter of Catskill Aqueduct*, Sec. No. 2, 62 Misc. 324, 116 N. Y. Supp. 640; *In re Board of Water Supply*, 133 N. Y. Supp. 213.

Comptroller may issue corporate stock to provide for expenses incurred under this act.

§ 33. The comptroller of the city of New York is hereby authorized and directed to raise from time to time by the issuance of corporate stock of the city of New York in addition to the amount which he is now authorized to raise for such purposes, such sums of money as shall be sufficient to pay for the salaries of the board of water supply and their subordinates, and for any real estate, or for the extinguishment of any right, title or interest therein acquired, and all damages appraised to persons interested therein, together with all expenses necessarily incurred in surveying, locating and acquiring title to said real estate, or in extinguishing claims for damages thereto and also

to pay for all construction work that may be contracted for and accomplished under this act, and for all other expenses of any nature or kind whatever that may be legally incurred under the provisions of this act. Such corporate stock shall be issued by the comptroller when thereto authorized by the board of estimate and apportionment, without the concurrence or approval of any other board or public body, and as provided in section one hundred and sixty-nine of the Greater New York charter. Such corporate stock shall be deemed to be bonds to provide for the supply of water within the meaning of section ten of article eight of the constitution of the state of New York, and in accordance with the provisions of said section a sinking fund shall be created on the issuing of the said corporate stock for its redemption by raising annually by taxation a sum which will produce an amount equal to the sum of the principal and interest of said corporate stock at its maturity. All payments from the proceeds of the sale of such corporate stock shall be made upon proper vouchers and authorizations in accordance with the provisions of this act and with the laws, regulations and practice now in force in regard to the payment of money by the comptroller of the city of New York. (*As amended L. 1907, ch. 438.*)

Work to be done by contract; when work may be done without contract.

§ 34. All work hereby authorized to be done and all materials hereby authorized to be furnished involving an expenditure of over one thousand dollars, shall be procured by contract made in the manner required by and pursuant to the provisions of this act. The board of water supply, however, may without contract cause such surveys to be made and such maps, plans and estimates to be prepared, as shall, in its opinion, be necessary to carry out the provisions of this act, and may appoint and fix the compensation of suitable engineers and other persons to supervise and inspect all work hereby authorized to be done. The board of water supply may procure any work to be done without contract, not involving an expenditure of over five thousand dollars, if they certify that in their opinion, it is for the public interest, that such work shall be done; and in such certificate they shall state their reasons therefor.

Construction and maintenance of highways and bridges; police protection.

§ 35. The city of New York is hereby required to build and construct such highways and bridges as may be made necessary by the construction of any reservoir under this act, and to repair and forever

maintain such additional highway bridges; and in case any bridge or highway thus constructed shall cross any railroad, it shall do so above or below the said railroad and not upon the same level. It shall be the duty of the board of water supply of the city of New York, to provide proper police protection to the inhabitants of the localities in which any work may be constructed under the authority of this act and during the period of construction, against the acts or omissions of persons employed on such works or found in the neighborhood thereof; and to that end the said board is hereby authorized and required to appoint a sufficient number of persons to adequately police the said localities for the said periods. The said board shall also have power to remove such persons and to fix or change their compensation in its discretion, which compensation shall be paid upon a certificate of the said board, by the city of New York, as part of the expense authorized to be incurred by this act. The said board shall give to each person so appointed a certificate of appointment and certified copies thereof, one of which shall be filed in the office of the sheriff of each county in which any work shall be in process of construction under this act and in which said person shall be authorized to perform his duties. Each of said persons so appointed shall be and have all the powers of a peace officer in the county where any work is being constructed under the authority of this act, and he shall at all times when on duty wear upon his clothing or have in his possession a shield or other suitable badge of authority which he shall at once exhibit to any person asking therefor. It shall be the special duty of the persons so appointed to prevent breaches of the peace and unlawful depredations and to arrest and bring before the proper magistrates persons employed on the said works or found in the vicinity thereof, who are guilty of offenses against the law punishable by death, imprisonment or fines, or persons whom they may have reasonable cause to believe to be guilty of any of such offenses. The sheriff of a county wherein a certificate of appointment of any such person as a peace officer is filed may cancel such certificate for cause, and shall immediately give notice in writing of such cancellation to the board of water supply of the city of New York, specifying the cause of such revocation. Such notice may be given by mail. On such cancellation the authority of such person as a peace officer shall immediately cease. Any expense necessarily incurred by a county, town or city in any criminal action or proceeding against any person employed on any work constructed or in process of construction under this act, or in the suppression of riots among persons employed on said work or in the prevention of the commission of crime by such persons after being duly audited as required by law shall

constitute a claim in favor of such county, town or city against the city of New York, and an action may be maintained on such audit as for money paid to the use of the city. (*As amended by L. 1906, ch. 314.*)

See *Matter of Simmons*, 58 Misc. 581, 109 N. Y. Supp. 1036 *aff'd* 130 App. Div. 350, 114 N. Y. Supp. 571 *aff'd* 195 N. Y. 573.

Monthly statement of expenses to be filed.

§ 36. The board of water supply shall in every calendar month file in the office of the comptroller of the city of New York an account of any expenses made by it, or under its authority, and of all liabilities incurred by it during the preceding month and an abstract of each such account shall be published in the City Record.

Protection of streams from pollution.

§ 37. The city of New York or its representatives shall not enter upon any lands not taken in pursuance of this act, for the purpose of preserving streams or watercourses from pollution or contamination, or of moving or causing to be moved any building, improvements or edifices on the ground that the same may contaminate the water supply without making a provision for just compensation to the owner of said buildings or improvements for the removal or destruction thereof. (*As amended by L. 1906, ch. 314.*)

Public not to be precluded from fishing or cutting ice in lakes, etc.

§ 38. Nothing herein contained shall authorize or empower the city of New York to prohibit the public from using the said lakes or reservoirs that may be constructed under the provisions of this act for the purpose of ice-cutting or fishing; and the city of New York, or its representatives, shall not hereafter prohibit the public from using said lakes or reservoirs which are now under the care or supervision of the city of New York for the purposes of ice-cutting or fishing, subject, however, to reasonable rules and regulations.

Taxation of real estate.

§ 39. Real estate acquired under the provisions of this act shall be taxable in the counties and taxation districts in which such real estate is situated.

Use of water supply of New York city by municipal corporations of Westchester county.

§ 40. Immediately upon the acquisition of an additional supply of water by the city of New York, under the provisions of this act,

or under proceedings instituted after the passage of this act, it shall be lawful for any of the municipal corporations in the county of Westchester to take and receive from any of the reservoirs, aqueducts, conduits, streams or pipes of the city of New York, a supply of water for the uses and purposes of the said municipal corporations. The connections with said reservoirs, aqueducts, conduits, streams or pipes shall be made at the expense of said municipalities, and they shall pay to the city of New York water charges or rates in the same amounts as are charged by the city of New York to persons using water in that city. Any such municipal corporation desiring to take and receive water under the provisions of this section shall make application to the proper officer in charge of the water supply of the city of New York in writing, showing the place and manner in which it is proposed to make said connections. It shall be the duty of the said officer to grant a permit or authorization for the said connections, under reasonable rules and regulations, including the installation of proper meters or other devices for ascertaining the quantity of water thus taken. Provided, however, that no greater quantity of water shall be taken by the said municipal corporations than the proportionate quantity that is used by the city of New York, the proportion being calculated according to the number of inhabitants respectively of the said city and municipal corporations as shown by the last preceding census of the United States.

Use of water supply by city of New York.

§ 41. It shall be lawful for any municipal corporation or other civil division of the state within the watersheds of Esopus creek, the Rondout creek, or the Catskill creek, in the counties of Ulster and Greene, at its own expense, to construct a pipe line or aqueduct connecting with any reservoir constructed therein under the provisions of this act, for the purpose of supplying water to such municipal corporation or other civil division of the state. The quantity of water that may be drawn by such municipal corporation or other civil division of the state from the said reservoir shall not exceed the proportionate quantity that is used by the city of New York, the proportion being calculated according to the number of inhabitants respectively of the city of New York and said municipal corporations or other civil divisions of the state as shown by the last preceding enumeration of the state of New York or the United States. The said municipal corporations or other civil divisions of the state shall pay to the city of New York a water tax or charge, founded upon the quantity of water consumed which rate or charge may be agreed upon between the board of water supply of the city of New York

and the authorities of such municipal corporation or other civil division of the state or shall be fixed by the state water supply commission, which commission is hereby given power to fix such compensation after hearing all parties interested. In case any water shall be taken under the provisions of this act from the Esopus creek, in the said county of Ulster, then and in that event and before any water shall be diverted from said Esopus creek, the city of New York shall, at the expense, cost and charge of the said city of New York and under a plan to be approved of by the common council and the city engineer of the city of Kingston, build, construct, reconstruct, alter or change the sanitary sewers of said city of Kingston known as the first and eighth ward sewers, the trunk sewer of which follows the general line of the Tannery brook in said city of Kingston and which now discharges or flows into the Esopus creek, so that the same shall discharge into the Hudson river or into the Rondout creek. The city of New York shall be liable for all damages of every name and nature which may result from the building, construction, reconstruction, alteration or changing said sewers, and shall also at the expense, cost and charge of the said city of New York, but in the name of the city of Kingston, acquire by purchase or by the condemnation proceedings provided for by this act, all rights in and over private lands in the said city of Kingston, which it may be necessary to acquire in order to build, construct, reconstruct, alter or change said sewers. The city of New York in executing the said plan, may use for such purposes the public streets of the city of Kingston or any right of way or easement that the city of Kingston now has for the purpose of constructing or maintaining sewers. (*As amended by L. 1906, ch. 314.*)

Damages to private property not taken under this act.

§ 42. The owner of any real estate not taken by virtue of this act and chapter seven hundred and twenty-three of the laws of nineteen hundred and five or of any established business on the first day of June, nineteen hundred and five, and situate in the counties of Ulster, Albany or Greene, directly or indirectly decreased in value by reason of the acquiring of land by the city of New York for an additional water supply or by reason of the execution of any plans for such additional water supply by the city of New York under the provisions of this act and charter seven hundred and twenty-three of the laws of nineteen hundred and five, their heirs, assigns or personal representatives shall have a right to damages for such decrease in value. The board of water supply of the city of New York may agree with such person as to the amount of such damages, and : ch agreement

cannot be made such damages, if any, shall be determined in the manner herein provided for the ascertaining and determining the value of real estate taken under the provisions of this act, and the commissioners shall not be limited in the reception of evidence to the rules regulating the proof of direct damages. And the amount of such damages so agreed upon as aforesaid or so determined as aforesaid shall be payable and collectible in the same manner as is herein provided in the case of awards made through the confirmation of a report of commissioners of appraisal. A person employed in a manufacturing establishment, or in an established business, or upon any lands and not an owner or part owner thereof or of an interest therein, in the counties of Ulster, Albany and Greene, which manufacturing establishment, or established business is injured or destroyed, or which lands are taken or acquired under or because of the provisions of this act, who has been so employed continuously for six months prior to the first day of January, nineteen hundred and six, and who continues in such employment up to the time of such injury, destruction, taking or acquisition shall have a claim for damages against the city of New York equal to the salary paid such employee for the six months immediately preceding the first day of January, nineteen hundred and six. Such damages may be determined by agreement with the board of water supply of the city of New York. In case such agreement cannot be made such employee may maintain an action against the city of New York in the supreme court to recover such damages, not however to exceed the sum of the wages paid him for the six months immediately prior to the first day of January, nineteen hundred and six. (*As amended by L. 1906, ch. 314.*)

See *People ex rel. Lasher v. City of New York*, 134 App. Div. 75, 118 N. Y. Supp. 742; *In re Benschel*, 140 App. Div. 806, 125 N. Y. Supp. 872; *Id.*, 133 N. Y. Supp. 84; *Matter of Simmons*, 58 Misc. 581, 109 N. Y. Supp. 1036 *aff'd* 130 App. Div. 350, 114 N. Y. Supp. 571 *aff'd* 195 N. Y. 573; *In re Board of Water Supply of City of New York*, 73 Misc. 231, 130 N. Y. Supp. 997.

Act construed.

§ 43. Nothing in this act contained shall be so construed as to repeal, affect or modify chapter nine hundred and forty-two of the laws of eighteen hundred and ninety-six, nor chapter seven hundred and fifty-two of the laws of nineteen hundred and four.

Provision for offices and expenses of board of water supply.

§ 44. The board of water supply is hereby authorized and empowered to provide suitable offices and conveniences for the trans-

action of its business and to provide proper and needful furniture and safes for the safekeeping of its documents, and to incur other necessary expenses suitable and proper to enable it to carry out the provisions of this act.

Laws not affected by this act.

§ 45. This act shall not affect any of the provisions of chapter four hundred and ninety of the laws of eighteen hundred and eighty-three, or the acts amendatory thereof, nor deprive the aqueduct commissioners of the city of New York of any of the powers conferred by such acts.

Submission of maps and plans to state water supply commission.

§ 46. The city of New York shall have no power to acquire, take or condemn lands under this act unless maps and plans covering the work contemplated by this act shall have been submitted to and approved by the state water supply commission. All amendments or modifications of such maps and plans thereafter made shall be in like manner submitted to and approved by said board, and when so approved, shall have the same force and effect as the original plans filed with said board.

L. 1905, ch. 725.

“An Act relating to the acquisition of property by the city of New York for a water supply, and providing for prompt payment therefor, and for damages occasioned by the acquisition thereof; providing for use and care of reservoirs owned by said city; and providing for the construction and maintenance of highways and bridges.”

Accepted by the city.

Became a Law, June 3, 1905, with the approval of the Governor. Passed by a two-thirds vote.

NOTE.—This statute is reprinted in full as it applies to the city of New York, and must be consulted in connection with L. 1905, ch. 724, reprinted at the beginning of Appendix II, and with the existing provisions of the Greater New York Charter, §§ 483–508 inclusive, as it affects those sections and by implication, displaces some of them. (See 3d Ed., pp. 351–367 inclusive and pp. 180, *et seq. ante.*)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Determination proceedings instituted since January 1, 1905.

§ 1. In all proceedings instituted subsequent to the first of January, nineteen hundred and five, under any general or special act,

to acquire property for the purpose of maintaining, preserving or increasing the water supply of the city of New York, or for the sanitary protection thereof, no more parcels shall be submitted to the same set of commissioners of appraisal at one time than can be reasonably passed upon and an award made by the commissioners within the limits of a year from the time of the taking of the oaths of the said commissioners.

See *Matter of Bensel*, 138 App. Div. 662, 123 N. Y. Supp. 217.

Removal of buildings, notice of.

§ 2. In all such proceedings after the taking and filing of the oaths of the commissioners, no buildings or improvements shall be removed or disturbed within one year from the date of the filing of the oaths of the commissioners unless ten days' notice is given to the owner or to his attorney, of the intention to make such removal, and affording him an opportunity to examine the property with the commissioners and such witnesses as he may desire. If the owner of the property cannot be found with due diligence, and there is no attorney representing the said property or parcel, before removing, disturbing or destroying any of the buildings or improvements, the representatives of the city of New York or the corporation counsel shall cause measurements to be made of the buildings and photographs of the exterior views thereof, which measurements and photographs shall be at the disposition thereafter of the claimant or his attorney in case such claimant or attorney should appear and demand the same before the case is tried.

Report of proceedings.

§ 3. In all such proceedings the commissioners shall make and file a report within one year and eight months from the date of filing their oaths in the county clerk's office.

Confirmation of report.

§ 4. In all such proceedings upon the application to confirm the report of the commissioners, the court may confirm such report or in its discretion order that the report or any portion thereof affecting one or more parcels be referred to the same commission or a new commission for a new hearing.

Compensation of commissioners and employees.

§ 5. In all such proceedings the commissioners of appraisal appointed thereunder shall receive as compensation such fees and expenses as may be taxed by the court upon notice to the corporation

counsel. The corporation counsel of the city of New York, shall either in person, or by such assistants or other counsel as he shall designate for the purpose, appear for and protect the interests of the city in all such proceedings in court including the taxation of fees, compensation and expenses and proceedings before the commissioners. The fees of the commissioners and the salaries and compensation of their employees, and their necessary traveling expenses and all other necessary expenses, in and about such proceedings to be had for acquiring title or extinguishing claims for damages to real estate, and such allowances for counsel fees as may be made by order of the court shall be paid by the comptroller of the city of New York out of the funds provided in such proceedings. Such fees and expenses shall not be paid until they have been taxed before a justice of the supreme court in the judicial district in which the lands or some part thereof are situated upon eight day's notice to the corporation counsel of the city of New York. Such allowances shall in no case exceed the limits prescribed by section three thousand two hundred and fifty-three of the code of civil procedure. The salaries and compensation of the persons employed, to prepare necessary surveys, plans and estimates and for other purposes and to direct, supervise and inspect the work required to be done under such proceedings, and such other expenses in and about the same as are not therein required to be under contracts let after competition, shall be paid by the comptroller of the city of New York, on the certification of the proper board or officer or of such person or persons as it or they may designate.

See *Matter of City of New York (Town of Hempstead)*, 125 App. Div. 223, 109 N. Y. Supp. 652 *aff'd* 192 N. Y. 569; *Matter of Simmons*, 61 Misc. 352, 113 N. Y. Supp. 890; *In re Benschel*, 124 N. Y. Supp. 716.

Maintenance of bridges.

§ 6. The city of New York is hereby required to build such highways and bridges as may be made necessary by the construction of any reservoir, and to forever repair and maintain such bridges.

Use of lakes and reservoirs by the public for boating, fishing and cutting ice.

§ 7. Any natural lake or any reservoir that may hereafter be used or built, or constructed by the city of New York for the purpose of water supply, under any general or special act may be used by the public for the purpose of boating as hereafter provided, cutting ice and fishing, and the said city of New York or its representatives shall not hereafter prohibit the public from using said lakes or reservoirs for

said purposes as hereafter provided, and to provide for such use and uses, said city and its representatives are hereby required to afford access to said lakes or reservoirs. It shall be lawful for the city of New York to permit the use of boats and boating on said lakes and reservoirs by granting permits to the owners of said boats and prescribing rules and regulations for the proper use thereof.

Compensation for damages to private property not taken by this act.

§ 8. In all such proceedings, in case any person owning private property not actually taken or proposed to be taken thereunder, but which will in his opinion be damaged by proceedings taken or proposed to be taken thereunder, the proper person or board representing the city of New York may agree with such person as to the amount of such damages, and if such agreement cannot be made, such damages, if any, shall be determined in the same manner provided for the ascertaining and determining the value of real estate taken under such proceedings, and the amount of such damages so agreed upon as aforesaid or so determined as aforesaid shall be payable and collectible in the same manner as is provided in the case of awards made through the confirmation of a report of commissioners of appraisal in such proceedings.

§ 9. This act shall take effect immediately.

A

449

Aldermen, board of—Continued	Page
ment, Telegraph, Public Comfort Stations, Maps.)	
subject to control of board of estimate.....	24
Ambulance service, board of:	
members of	219
powers and duties concerning ambulance service.	219
employees of	219
contracts with hospital corporations	219
Appropriations: (<i>See</i> Officers of City.)	
comptroller to furnish monthly heads of departments, statement of balance of.	57
Areas: (<i>See</i> Encroachments.)	
Armories:	
armory board, powers of.	406
Art commission: (<i>See</i> Parks.)	
members of; how constituted; term of office.	208
to approve works of art acquired by city	208
defined	208
no work of art to be removed or altered without approval of	208
designs for buildings, arches, bridges, etc., to be approved by	209
exception of structures costing not more than \$25,000.	209
power of park board not diminished.	209
Assessment for local improvements:	
grading streets with material excavated in making other public improvements	276
proportion borne by city and by property benefited determined by board of estimate and aldermen	169
determination reconsidered upon request of property owners.	169
remedies for vacation of, limited.	277
petition to Supreme Court for fraud or substantial error	277
repavements of streets.	274
vacated, may be reassessed by assessors.	278
upon notice by advertisement	278
Assessment bonds: (<i>See</i> Bonds.)	
Assessments and arrears:	
arrears for personal taxes:	
by suit by corporation counsel.	272
suit for, when dismissed in case of inability to pay.	272
not maintainable against non-resident	272
on real estate, bills for, to be furnished by collector	345
payment of, countersigned by comptroller.	345
conclusive evidence	345
accounts of paid, kept by comptroller	345
interest on, seven per cent	328
for what periods.	328
tax lien, defined, right of city to receive taxes, etc., and lien thereof: (<i>See</i> Transfer of Tax Lien, below.)	331, 332
advertisement of sale of, by collector.	331
payment by owner, previous to day of sale.	332
sale of, at auction, in consideration of advance of tax, etc., for lowest rate of interest not exceeding twelve per cent.	332
when arrears of taxes, etc., are so large in proportion to property that	

Assessments and arrears—Continued	Page
security is insufficient, comptroller may fix lesser amount for tax lien to be sold.	341
certificate of comptroller in such cases.	341
reduced amount constitutes tax lien.	341
sale by collector, after advertisement for reduced amount. . . .	341
in case no bid, new certificate for further reduced amount. . . .	341
certificate of collector and comptroller that there are no tax liens for unpaid taxes, etc., forever frees lots from such taxes.	346
statutory provisions for sale of, constitutional.	333
postponement of sales.	333
if no bid received, city may bid in tax lien.	333
resale of, on default of purchaser, upon advertisement.	334
becomes due three years from sale.	336
interest on, until discharged, at rate of purchaser's bid.	336
becomes due, upon default for six months in payment of interest at option of purchaser.	336
satisfaction of, before maturity by payment by owner upon notice to purchaser, or to collector for his benefit.	336
discharge of, by payment to collector, or surrender of transfer of tax lien with satisfaction price by purchaser.	337
with surrender of transfer of tax lien, in case of loss or mutilation.	337
certificate of, by collector.	337
exemption from state or local taxation.	337
foreclosure of:	
on failure to pay when due, by holder.	337
parties to.	338
procedure the same as in actions to foreclose mortgages on real property.	338
pleading in.	338
transfer tax lien, presumptive evidence of validity of tax, etc. . .	338
defense of invalidity to be affirmatively pleaded and established by party setting up same.	339
presumption as to transfer of tax lien, in actions for.	339
judgment in, directing sale of real property affected by tax lien	339
effect of, as to parties defendant to transfer their title in real estate affected, to purchaser on sale thereunder. . . .	339
possession, delivery of to purchaser on sale compelled.	340
surplus of proceeds of sale, how disposed of.	340
does not constitute "arrears" after notice to collector, as long as foreclosure remains in force.	340
vacated or set aside in action of foreclosure, or declared by corporation counsel that a defense thereto will succeed, purchaser to be reimbursed by city.	342, 343
action to vacate against city, limited to five years from date of sale.	343
actions to vacate for invalidity, notice to be given to city.	343
tender of defense to city.	344
duties of corporation counsel.	344
judgment in, that tax lien is invalid in whole or part, purchaser to be reimbursed.	345

Assessments and arrears—Continued	Page
transfer of tax lien:	
delivered to purchaser on sale	334
effect of, to transfer tax lien free of all taxes, etc., upon premises at time of sale	334
contents of, regulated	334
to be executed and acknowledged by collector of assessments and arrears	335
copy of, to be retained in office of collector.	335
assignment of, deemed conveyance.	335
record of, as mortgages in office of recording officer of county	335
evidence in courts.	335
presumed satisfied, when it appears from recorded instruments, that tax lien has been assigned to owner of lands.	336
discharge of, by payment of tax lien to collector, or surrender of, with satisfaction piece.	337
foreclosure of: (<i>See above Tax Liens.</i>)	
vacated, set aside or cancelled, purchaser to be repaid amount of transfer tax lien with interest and costs.	341
reimbursement by city to purchaser, when part of tax lien defective	342
validity of may be questioned by holder of.	342
by notice to collector.	342
referred to corporation counsel for opinion	343
surrender of by holder, if corporation counsel declares defense to, exists in whole or in part	343
reimbursement by city to purchaser on surrender of invalid tax lien	343
defective or invalid:	
proceeding anew as to part held valid	344
lost, duplicate delivered by collector upon receipt of bond of indemnity	345
Auctioneers:	
licensed by city clerk.	20
his discretion not subject to review.	20
marshal selling under execution, need not be licensed.	20
police supervision over.	130
president of aldermen to revoke license for fraud.	20
his action not to be arbitrary, but governed by evidence.	20
sale by, without license, a misdemeanor.	20
security to be given by	20
Automobiles:	
injuries by, in race on street, city not liable for.	26
ordinance regulating speed of, when invalid	26
must prescribe speed in accordance with state statute	26
use by, of street, not permissible by ordinance.	26
Awnings: (<i>See Encroachments.</i>)	

B

Banks of deposit of city funds:	
how designated.	79
interest on daily balances.	79

Banks of deposit of city funds—Continued	Page
to give bond:	
form of and condition	79
deposit of bonds, as surety for.	79
withdrawal of, when	79
Bay windows: (See Encroachments.)	
Bill boards: (See Signs.)	
Births:	
registration of, not previously reported	367
upon application of parents	367
requirements of application	367
application must be within ten years	368
change, on satisfactory proof.	368
transcripts of records of, when furnished.	368
Bonds of city:	
must be approved by board of estimate before issued.	23
interest on, to be legal rate	23
powers of aldermen concerning issue of	23
to be known as corporate stock (except assessment bonds)	64
general fund bonds issued under section 222, included in corporate stock. (See Sinking Fund.)	66, 92
corporate stock:	
defined and limited to certain purposes	64
faith and credit of city, pledged for	64
form designated by comptroller.	64
authorized by board of estimate for certain purposes without concurrence of other body	65
when sanction of aldermen to issue of, necessary.	66
signed by comptroller and mayor	64
sealed with city seal.	64
attested by city clerk.	65
coupon or registered.	65
in sums not less than \$500	65
payable in gold in U. S. currency	65
currency of foreign country	67
when redeemable	65
free from taxation except for state purposes.	65
interest at rate fixed by sinking fund commissioners.	65, 84
when payable	65
proceeds of sale of, not to be expended for operating expenses	66
may be used for expenditures of board of water supply	67
to be recorded in U. S. as well as foreign currency	67
not sold as provided in section 182, comptroller may sell on competitive tenders.	67
to be issued by city to take place of bonds authorized prior to January 1, 1898.	67
may be issued at rate of \$5,000,000 per annum for docks, wharves and piers	71
assessment bonds:	
issued for what purposes.	72
term and rate of interest.	72
proceeds of, how applied.	72

Bonds of city—Continued	Page
proposals for bonds or stock:	
except certificate of indebtedness	73
corporate stock issued in foreign currency	73
bonds purchased by sinking fund	73
ten days' public advertisement	73
publicly opened by comptroller	73
bidder to deposit certified check	74
required to accept portion of bid	74
"all or none" bids	74
sale to highest bidder	74
return of deposit to unsuccessful bidders	74
refusal of bidder to take bonds, forfeit of deposit	74
comptroller may sell at private, those not disposed of at public sale	74
notes:	
limited to one year, issued in anticipation of sale of corporate stock	78
proceeds of, use of limited	78
not renewable, after sale of corporate stock	78
renewal of, before sale of corporate stock	78
redeemable from proceeds of corporate stock	78
amount of, limited	78
payment of	
provisions for, by annual payments into sinking fund	93
surplus revenues in sinking fund	94
deficiencies in sinking fund for, included in annual budget	94
revenue bonds:	
issued for city's quota of state taxes	74
issued in anticipation of revenues	75
redeemable out of tax levy	75, 76
issue of, discretionary with comptroller	76
not counted in computing city's indebtedness	76
to pay expenses for condemning unsafe buildings	76
costs incurred by police officials in defending charges or title to office	77
judgments	77
amounts appropriated after final annual appropriations	77
expense of supplying water meters	77
deficiencies in street and park opening fund	77
claims, etc., not otherwise provided for	77
expenses authorized by board of estimate and aldermen, not exceeding \$2,000,000, annually	77
extraordinary expenses of board of health	77
Bonds for destitute wives and children: (See Abandonment Proceedings.)	
Boroughs: (See Buildings.)	
president in each:	
removal of	136
member and chairman of local board of every district in borough	137
office in hall of borough	137
commissioner of public works:	
appointed and removed by	137
powers of	137, 141
discharge duties of president, in his absence or illness	137

Boroughs—Continued	Page
secretary, assistants, clerks and subordinates to be appointed by . . .	137
subject to provisions of civil service law	137
powers of enumerated	137, 139
to prepare contracts for his borough.	138
subject to approval of corporation counsel	138
annual report by	138
additional powers in Queens and Richmond	138
powers of, may be performed by commissioners of public works or subordinates	139
former commissioner of highways transferred to president of respective boroughs	151
to provide rooms and supplies for justices of Supreme Court.	151
transfer of jurisdiction of certain streets in Brooklyn from depart- ment of parks to president of Brooklyn borough	204
Bridges:	
building of, by ordinance of aldermen	23
commissioner of:	
powers and duties of	201
not authorized under section 455 to employ a consulting engineer for compensation based on percentage of work done.	174
liability of city for not guarding	145
snow or ice on.	201
injuries on railroads on	201
markets on, within jurisdiction of comptroller under § 151.	174
municipal building, construction of, under L. 1907, ch. 670, in charge of department of bridges.	201
Brooklyn:	
former city of:	
grant of franchise by.	40
ocean boulevard in; restriction as to use of.	204
Budget: (See Estimate and Apportionment.)	
action on, by board of estimate and aldermen, financial and not legis- lative	92
after adoption of, how appropriations transferred	96
annual may be amended by board of estimate.	92
effect of as to appropriation of salaries	92
include maintenance of certain institutions designated.	94
Building Code:	
has force of statute	156
modification of, by board of examiners	158
signs on buildings governed by	24
on walls of buildings, not within.	25
Buildings: (See Building Code.)	
bay windows in unauthorized.	157
dumb waiters, enclosure of, in.	154
elevators in without guards according to Building Code.	154
excavations for, below ten feet.	153
fire escapes in factories	157
fireproofing of	154
liability of city for unsafe.	145
ordinances concerning safety of, within police power.	25

Buildings—Continued	Page
schools to be built fireproof, except in certain cases	155
sidewalk sheds during construction of	154
superintendent of:	
city not liable for negligence of, in approving defective plans, or neglect in enforcing law	152
power to appoint employees limited by appropriation	152
when, and when not, compelled by mandamus to act on plans.	152
unsafe, lien by <i>lis pendens</i> for expenditures	157
removing debris of	157

C

Cellarways: (*See* Encroachments.)

Cemeteries:

prohibited in Queens County	394
exceptions	394

Chamberlain: (*See* Finance, Department of.)

Change of Grade: (*See* Grade of Street, Change of.)

Children, destitute: (*See* Public Charities, Department of.)

day nurseries for	214
-----------------------------	-----

City clerk:

legislative office within Civil Service Law	19
deputies of, in unclassified Civil Service	19

City of New York:

aldermanic districts in; boundaries of	2-19
aldermanic districts in; seventy-three bounded	2-19

City Court of New York:

has no jurisdiction of actions against city	107
---	-----

Civil service, municipal:

statute governing, liberally construed	43
positions not subject to:	
confidential positions	43
probationary officers	43
veterans' protection from removal under	44
classification of:	
competitive, what included	44, 45
non-competitive, what included	44, 45
not reviewable by mandamus	45
examination of applicants:	
statements on papers not contract with candidates	45
questions on, when illegal	45
not set aside by courts unless palpably illegal	45, 46
eligible list and appointments therefrom:	
binding upon appointing officer	46
rule limiting selection from by appointing officer, invalid	46
veteran on, entitled to preference	46
provisions of, that same terminates in one year, valid	46
emergency appointments, when legal	47
probationary appointments, how made by appointing officer	47
appointees, how removed	48

Civil service, municipal—Continued	Page
promotions:	
caused by increase in salary, do not apply to graded class	48
to be determined by competitive examinations	48, 49
prior service to be considered	49
marking on examination for	49
when mandamus lies to compel examination for	49
certificate to pay roll by commissioner	50
removals:	
based upon political affiliations	50
of veterans	50, 51
volunteer firemen	51, 52
by abolishing positions	52, 53
remedies for, by veterans and volunteer firemen	53, 54
generally, by mandamus	54, 55
Claims against city: (<i>See</i> Actions against City.)	
not to be paid except upon judgments, awards, etc., unless auditor cer-	
tifies that charges are just and reasonable	56, 58
claimant may be sworn and examined	56
cannot be examined, after action begun by him	58
comptroller settles:	
power to settle does not include right to dispute salary authorized . .	56
settlement cannot take form of new agreement	60
cannot by mandamus be compelled to pay, unless mayor party to	
proceeding	60
cannot by mandamus be compelled to pay unliquidated demand . .	60
illegal, power of board of estimate to compromise on equitable grounds	98, 99
for injuries to personal property:	
notice of intention to sue to be given within six months	103, 105, 106
to what class of injuries applicable	105
barred after one year	103
must be presented to comptroller 30 days before action begun	103
enforceable in equity, need not be presented before suit	103
provision requiring presentation, does not affect liability of city or date	
when interest begin	103
filing of, with corporation counsel, not equivalent to presentation to	
comptroller	104
presentation of, not waived by examination of claimant by comptroller . .	104
Clerks: (<i>See</i> Officers of City.)	
Coal:	
weighing of, governed by ordinance	24
statute also	24
Combustibles:	
fire commissioner to enforce ordinances in respect to	230
liability of city for injuries sustained by explosion of	230
Commissioners of account:	
authority by this section to examine officials' accounts, constitutional . .	42
power to examine, applies to elective as well as appointed officers	42
not affected by like authority of aldermen	42
does not include right to compel production of books by person not	
in city employ	42

Commissioners of account—Continued	Page
examine witnesses, how exercised	42
cannot be compelled by mandamus to furnish taxpayer minutes of investigation.	42
Common shows:	
moving picture exhibition is common show.	33
not prohibited on Sunday, under Penal Code.	33
license for, cannot be revoked arbitrarily	33
Comptroller: (<i>See</i> Appropriations, Contracts, Finance, Department of, Leases, Property of City, Awards.)	
annual salary \$15,000	58
account to city for all fees and emoluments	58
deputy comptrollers:	
two appointed by comptroller	61
powers and duties of	61
designated to act as comptroller, when	61
assistant deputy comptroller:	
powers and duties of	61
to sign warrants for comptroller	61
Condemnation proceedings: (<i>See</i> Streets, Docks, Water Supply.)	
land, owner of may offer to sell through attorney authorized	384
awards for lands in, may be purchased by city, prior to confirmation of commissioners' report	385
assigned by owners to city, on purchase	385
commissioners of estimate:	
qualifications of	385
principles to be employed in estimating damage	386
price paid for land some evidence of value	386
buildings, value how determined.	386
trade fixtures, when compensated.	386
report of, and action of court:	
review of values in what instances	387
appeal from order of confirmation, when allowed.	388
title when vested by resolutions of board of estimate	388
Contracts: (<i>See</i> Actions against City, Finance, Department of, Work and Supplies.)	
additional work not exceeding five per cent may be included in.	159
agreement for substitution of other materials, invalid.	164
after award of, to lowest bidder, head of department cannot rescind because comptroller has given no certificate	159
bids for:	
lowest bid gives no right of action against city.	163
not required, if expenditure, less \$1,000.	159
for emergency work	164
services requiring scientific skill or knowledge	166
advertisements for	159
awards to lowest bidder	159
rejection of	159
not valid after lowest bidder notified of award.	162
in case all bids are in excess of amount appropriated	163
formal characteristics of, prescribed by aldermen.	162
to be publicly opened	159

Contracts—Continued	Page
not to be accepted from one in default to city	160
to be sealed.	159
certificate of completion	166
comptroller's duties:	
certificate of, must be endorsed on	56
showing sufficient unexpended balance.	56
in purchases of coal	56
can be compelled by mandamus	59
exception of expense not exceeding \$1,000.	56
duplicate:	
required	160
filed in department of finance	160
with copy of ordinance	160
with approval of board of estimate.	160
extra work, when and when not recoverable.	163
for less than \$1,000, effect of audit on	59
labor law, clauses required by to be inserted.	165
made by borough presidents or heads of departments.	158
method of binding city by, enumerated.	161
payments on, not chargeable with interest	73
percentages reserved, limited.	73
proposals and specifications	161
omission of, makes contract invalid	161
recovery upon, for extra work, although no appropriation therefor . . .	60
sealed proposals for	159
surety, completing work under, when entitled to recover.	164
terms of to be settled by corporation counsel prior to bid	159
without public letting less than \$1,000 equivalent to agreement for <i>quantum meruit</i>	165
Coroners:	
physician to, personal to coroner.	407
term of office.	407
clerks to, under Civil Service Law	407
stenographers, salaries of	407
Corporate stocks: (<i>See Bonds.</i>)	
Corporation counsel: (<i>See Actions against City, Claims.</i>)	
authority of, in bringing suit for city, presumed	102
classification of employees by Municipal Civil Service Commission. . .	102
may offer judgment on claim against board of education without con- sulting comptroller.	103
represents various boards and officers of city.	102
to conduct suits for collection of personal taxes.	272
Correction, department of:	
commissioner of:	
member of board of inebriety	215
jurisdiction over institutions for criminals and misdemeanants. .	220, 221
jails of Kings County and civil prisoners committed to sheriff of Kings County.	220
transfer of prisoners by.	220
employees formerly in Kings County jails to be transferred to depart- ment.	221

Correction, department of—Continued	Page
jurisdiction of state lunatic asylum on Hart's Island, after inmates re- moved elsewhere	221
burial of paupers	221
matrons in, salary after five years' service	222
Costs:	
of officers for defending proceedings for removal, charge against city . .	95
County Court of Kings County:	
has no jurisdiction of actions against city	107
Court yards: (<i>See</i> Encroachments.)	

D

Dance halls:	
"public dance" hall defined.	391
"dancing," statutory definition of	391
forbidden, unless licensed	392
license for:	
preliminary inspection and report	392
fees fifty dollars per annum	392
revocation of; causes for.	393
inspections of	392
inspectors of, appointment of.	394
sale of liquors forbidden in.	393
Day nurseries for children: (<i>See</i> Public Charities, Department of.)	
Debt, limit of city:	
city's permanent indebtedness:	
rapid transit bonds not within.	92
bonds for construction of docks, not within	92
general fund bonds, when not within	92
District Attorney:	
residence of	394
salary	394
assistants to number of 14; salary of	394
to reside in county.	394
Docks: (<i>See</i> High Water Line.)	
building of, by ordinance of aldermen	23
and authorize loans on bonds	23
board of estimate must first approve	23
lease of water front, subject to cancellation	40
right of owner of, subject to rights of public.	41
liability of city, for dilapidated condition of.	243
owner, due to collapse of	243
construction of, causing injury to abutting owner, city liable for	244
land for, how acquired by city, procedure on	278
condemnation of land for:	
consequential damage	244
award for plottage	244
equipment of gas company.	244
change of plant of electric railroad company	245
award, how divided between landlord and tenant	245

Docks—Continued	Page
bulkhead rights, award for.	246
wharfage rights, when compensated	246
reports of commissioners may be separate or partial.	247
how made and confirmed	247
certain wharf property on East River:	
between Montgomery and Eighth Street.	247
no preliminary attempt to agree with owner upon price, necessary.	248
title to, vests upon resolution of sinking fund.	248
awards for, draw interest from vesting of title	248
resolution vesting title, not valid unless passed at public hearing	248
after notice	248
certain wharf property on North River:	
between 34th and 42d and 49th and 50th Streets	249
no preliminary attempt to agree with owner upon price, necessary.	249
title to, vests upon resolution of sinking fund.	249
awards for, draw interest from vesting of title	249
certain wharf property in Brooklyn:	
at Whale & Newtown Creeks and North Henry and Green Streets	250
unnecessary to make attempt to agree with owner on price.	250
title to, vests upon resolution of sinking fund	250
certain wharf property between 44th and 49th Streets:	
unnecessary to make attempt to agree with owner on price.	250
title to vests upon resolution of sinking fund	251
awards for, draw interest from vesting of title	251
recreation piers:	
docks set apart for.	254
purposes of	254
docks to be rebuilt for.	254
to be under control of commissioner of docks.	254
police authorities to maintain order on	254
shedded piers:	
license to tenant to shed pier in discretion of commissioner of docks	255
revocation of.	255
destruction of shed by fire, does not revoke	255
to be compensated upon condemnation proceedings by city	255
dockmaster cannot bind city for work	216
vessel at end of, when at its own risk of injury	256
Docks, department of:	
corporate stock may be issued for, at rate of \$5,000,000 per annum without approval of aldermen	71
commissioners of sinking fund to dispose of proceeds of sale of	71
proceeds of sale devoted to certain purposes.	71
operating expenses of, defined	72
not to be paid out of sales of corporate stock.	72
limitation of annual expense, does not include cost of operation of ferries	72
Docks and ferries, department of: (See Ferries.)	
commissioner of docks is head.	242
appointed by mayor	243
deputies appointed and removed by commissioner.	243
salaries of	243

Docks and ferries, department of—Continued	Page
perform duties and possess power of commissioner in absence or disability	243
duties of, defined by commissioner	243
Dockmasters: (<i>See</i> Docks.)	
Drains: (<i>See</i> Sewers.)	
Drunkards, care of: (<i>See</i> Inebriety, Board of.)	

E

Education, department of:	
board of education:	
liability of, for negligence in not closing schools.	346
for neglect to clean schools.	346
power to contract for electric light	347
dispose of personal property no longer used	347
sell products of trade and vocational schools	348
lease property for school accommodations.	348
fines imposed by by-law binding on employees.	349
judgments against must be paid by comptroller.	60
licenses to teach:	
eligible lists separately for male and female teachers.	349
right to be placed on eligible list.	349, 350
teachers, appointment of:	
discretionary with board.	350
temporary designation does not constitute	350
transfer of	351
when mandamus will lie, to compel	350
grounds for removal of	359
remedies for wrongful removal.	360
salaries of employees:	
janitor fixed by aldermen	348
during suspension.	348
statistician, fixed by aldermen	348
evening school teacher, changed by board of education	349
fixing of teaching staff by by-law of board	351
minimum existing salaries preserved.	351
uniform schedule for teaching staff required.	351
no discrimination on account of sex	352
to be based upon certificates of experience issued to teachers by board of examiners.	352
retirement fund:	
includes the funds of former corporations consolidated.	354
board of education to have charge of.	354
comptroller, custodian of	354
sources of income stated.	354
board of retirement, members of.	356
beneficiaries of, include colleges.	356
by reason of mental or physical incapacity.	356
length of service.	357
allowances from, on retirement	357, 358
appropriations for clerical expenses of administration.	359

	Page
Electricity, electrical conductors: (<i>See</i> Franchises.)	
permit to open street to place wire in electric subway not granted, until	
space assigned in same, by owner of subway	187
only one system of conduits for, in city	187
Employment agency: (<i>See</i> Intelligence Offices.)	
Encroachments: (<i>See</i> Signs.)	
areas within stoop line, permissible.	29
more than five feet on street, a nuisance	29
awnings, wooden, beyond building line, a nuisance	30
city not liable for injuries by.	30
bay windows beyond building line, unlawful.	27
cellarways permitted by ordinance, not a nuisance	29
court yards in streets, a nuisance	29
liability of city for	144
municipal permit no defense to, in streets.	27
ornamental wall beyond building line, nuisance.	27
permanent structures beyond building line in Fifth Avenue, unauthorized.	27
portico occupying sidewalks, nuisance	27
removable, by city by suit in equity	28
property owner in equity	28
mandamus upon call on official, by property owner	28
mandamus requiring person maintaining to remove	29
show windows on street, nuisance.	27
stoops, when illegal	28
taxicab stand in street, contract for invalid	30
Engineers:	
of steamboilers:	
revocation of license by police commissioner not reviewable on certiorari.	131
Estimate and apportionment, board of: (<i>See</i> Property of City, Public Improvements.)	
controls municipal powers of aldermen	23
must first approve all bonds authorized by aldermen	23
not authorized to permit private railroad on streets	96
power to exchange lands under water for other lands	97
compromise claims on equitable grounds although illegal.	98
resolutions, amendments of, at subsequent meetings.	92
retirement by, of employees of finance department.	64
to make budget: (<i>See</i> Budget.)	92
transfer appropriations, after adoption of budget.	96
Explosives: (<i>See</i> Combustibles.)	
municipal explosives commission.	236
members of, appointed by mayor	236
regulations of, constitute part of code of ordinances	236
Expressmen: (<i>See</i> Licenses.)	
licenses of, by aldermen	32
drivers, not unconstitutional	34
applicable to express companies in interstate commerce.	34

F

Ferries:	Page
acquisition of, by purchase or condemnation in borough of Brooklyn . . .	251
corporate stock issued for.	251
cost of operation of, not limited by annual allowance to department of docks	72
employees formerly engaged on ferries, to be retained by city	252
no corporate stock issued to maintain or operate.	251
operation and maintenance, moneys for, to be provided in same manner as for maintenance and operation of city properties	251
purchase or condemnation of property used in connection with ferries . .	252
title to vest in condemnation upon resolution of sinking fund. . . .	252
awards to draw interest from time of vesting title.	252
right to establish, is a perpetual franchise compelling city to operate . .	253
Finance, department of: (See Claims against City, Comptroller.)	
accounts of other departments, subject to revision and inspection by . .	55
forms of keeping, prescribed by.	55
chamberlain: (See Banks of Deposit.)	
protected in payment by order of court.	78
to keep books of receipts and payments.	80
reports by	80
salary of.	80
fees of, belong to city	80
appoints and removes deputies, etc.	80
may designate warrant clerk	80
duty to pay over money on deposit for 20 years	80
control over public markets	63
employees of, retirement of by board of estimate.	64
annuities on, regulated	64
payments to creditors, officers, etc., mode of, fixed by	55
auditing bureau, must allow, prior to.	56
vouchers for, to be filed.	55
by warrants drawn by comptroller and countersigned by mayor . .	55
salaries how drawn, fixed by	55
Fires: (See Fire Department.)	
aisles and passageways of theaters to be kept clear.	229
causes of, investigation by fire commissioner	230
extinguishing apparatus, power of commissioner to order.	229
as between landlord and tenant.	229
fire hazards:	
when a nuisance in buildings, structures, etc.	232
abatement of, as nuisances.	232
by owners	232
fire department, upon refusal by owner.	232
expense of, charge against owners and lessees.	232
lien on rent of premises.	233
survey to determine, upon demand of owners or lessees.	233
how and by whom held.	233
report upon.	234
subject to review by certiorari by Supreme Court	235
expense of, by whom borne	235

Fires—Continued	Page
deposit for.	235
payment of enforced	235
lien on premises	235
vacating buildings for failure to obey orders.	235
order of Supreme Court sanctioning vacating of buildings	235
investigation of:	
bureau of fire prevention.	236
officials of, fire marshal, etc..	236
origin of fires, supposed arson, incendiarism or criminal carelessness	236
examine witnesses under oath	236
report of, by investigating officer	236
furnished to board of fire underwriters.	236
to owners of property	236
to police commissioner and district attorney.	236
means of exit, in cases of fire, ordinances in respect to, enforcement of.	230
prevention of:	
buildings to be inspected by fire commissioner.	230
order removal of violations in respect to	231
installation of fire alarm and fire extinguishing equipment.	231
repair or removal of buildings inadequately provided.	231
removal of vessel on fire as menace to shipping or property	231
orders not complied with to be enforced by proceedings.	231, 235
served on owners, lessees, etc.	231
manner of service.	231
transmission by agent to owners.	235
right of way.	228
safeguards against, power of commissioner to require.	229
Fire department: (See Combustibles, Fires.)	
bureaus:	
commissioner to organize	223
fire, charge of extinguishment of fires.	223
fire prevention	223, 236
chiefs of	223
commissioner of:	
to enforce ordinances for prevention of fires	230
covering combustibles and explosives.	230
controls and manages property of department	223
officers and subordinates appointed by	223, 224
fire alarm:	
permit to private corporation to connect with, valid.	224
auxiliary systems maintained by private parties to pay for service as	
fixed by board of estimate	228
fire marshal:	
limitation of powers of	237
horses unfit for use of, transferred to Society for Prevention of Cruelty	
to Animals.	223
sale of by society, proceeds go into pension fund.	223
transfer to other departments	223
life insurance fund:	
composed of New York fire department life insurance fund.	240
Brooklyn widows' and orphans' fund	240

Fire department—Continued	Page
benefits continued	240
deductions from monthly pay for	241
treasurer of, to make semi-annual report.	241
payments from	241
transfers to, from relief fund	241
pensions:	
to widows, etc., of members.	239
trustees may terminate.	239
amount of regulated.	239
to members of former fire departments consolidated in the city	240
relief fund:	
additional payments from.	237
retiring members of uniformed force:	
certificates of medical officers.	238
mandamus to review amount of pension	238
uniformed force:	
promotion of, upon what basis.	224
qualifications for appointment to	224
probationary period before permanent appointment	225
salaries of, enumerated	226
members of former municipalities, retained.	226
pilot of fireboat when member of.	228
charges against members of:	
rehearing on allowance by mayor, within one year	403
application for, waiver of back pay.	403
reinstatement by commissioner, if member has been illegally or unjustly dismissed.	403
removal from:	
order for dismissal	225
cause for.	225
Fire insurance companies:	
foreign, tax on:	
doing business in borough of Richmond.	242
paid to fire commissioner	242
distribution of.	242
Fireworks:	
not a nuisance <i>per se</i>	24
Franchises: (<i>See</i> Street Railways.)	
contract for construction of subway, not franchise requiring mayor's ap- proval under § 72.	39
of former city of Brooklyn	40
permit to lay main granted by borough president to water supply com- pany, does not constitute franchise.	38, 186
proceedings prior to grant of	40
right to maintain tunnel under street between two buildings not a fran- chise	39
to have proprietors to connect with street railroad forbidden	39
to lay gas mains granted by state statute when perpetual.	187
to lay wires for distributing electricity underground, granted by board of estimate.	186
to lay city water main for private purposes not a franchise.	40

Franchises—Continued	Page
to telephone companies limited to twenty-five years.	38
gas companies having statutory franchise, not necessary under § 73	39
to use streets for electric wires, may be revoked at any time before acceptance.	186

G

Gas companies: (<i>See</i> Franchises.)	
Grade of street, change of:	
accrue at time of actual physical change.	275
damages for:	
rights of abutting owners	275
owners of property in villages incorporated in city	275
in 23d and 24th wards under L. 1893, ch. 537.	276
by user.	276

H

Hawkers: (<i>See</i> Peddlers, Theater Ticket Speculators.)	
Health, department of: (<i>See</i> Births.)	
acts of, presumptively valid.	366
aliens, sick with contagious diseases, how supported	363
contagious diseases, person sick with, to be removed	362
hospitals for, to be provided.	362
existing city hospitals may be designated for contagious disease patients transferred to board of health	363
hospital corporation when may admit persons having contagious disease	363
orders of, legislative and not judicial	367
pension fund:	
income of.	369
personal representatives of deceased physicians and employees, when entitled to, and amount of pensions	369
beneficiaries of, after twenty years' service.	370
powers of, delegation of, when valid.	366
records of, when open to inspection of taxpayer	366
sanitary code:	
courts take judicial notice of	364
milk, licenses for sale of	364
eggs, unwholesome, prosecution for storing in city.	365
poultry, permit for sale and slaughtering.	365
smoke, cinders, etc., forbidden.	365
High water line:	
agreement for, between commissioner of docks and owner of upland.	243
and map to be transmitted to board of estimate	243
approved by board of estimate, line to become permanent	243
Hospitals: (<i>See</i> Ambulance Service, Board of.)	
employees of, appointment, salary	215

I

Ice and snow: (<i>See Streets.</i>)	Page
Inebriety, board of:	
inebriates:	
defined	218
arrest of, to be reported to board	217
investigation of, by field officer	217
not previously arrested for twelve months, to be released upon request.	217
arrested before within twelve months, to be reported by field officer to court	217
committed to board for one to three years	218
furnishing inebriates committed, with liquor, a misdemeanor	218
parole by board	218
violation of, rearrest of offender	218
commitment to, of offenders breaking parole	218
discharge of, by board.	219
release of, by court on application of board	219
maintenance of, by payment by inebriate.	219
established by board of estimate.	215
members of, appointed by mayor	215
upon recommendation of certain charitable institutions.	216
terms of	215
commissioner of charities and correction, <i>ex officio</i> members	215
vacancies, how filled	216
officers and employees of	216
offices of, in boroughs	216
records of males arrested for intoxication	216
hospital and industrial colony for care of inebriates to be established.	217
Institutions:	
entitled to be included in annual estimate for maintenance.	94
charitable, distinguished.	95
Insurance companies: (<i>See Fire Insurance Companies.</i>)	
Intelligence offices:	
license of, by aldermen	32
governed by Business Law (L. 1909, ch. 25).	33
license revocable by commissioner of licenses	33
revocation of, not reviewable, after expiration	34
change of, location of	33
licensee of, may employ, unlicensed person.	33
charges against.	33
police supervision over	130
Interest: (<i>See Assessments, Assessments and Arrears, Bonds, Taxes, Water Rents.</i>)	

J

Janitors: (<i>See Education, Department of.</i>)	
of schools:	
not within labor law as to prevailing rate of wages.	37

	Page
Judgments: (<i>See</i> Actions against City, Claims.)	
recovery over by city from party primarily liable in cases of negligence. .	149
Junk dealers:	
license of, by aldermen	32
license of, legitimate exercise of police power	34
not applicable to wholesale dealers in masses of metal	34
police supervision over	130

L

Leases:	
comptroller to enter into, upon authority of commissioners of sinking fund	57
Libraries: (<i>See</i> Public Buildings.)	
Licenses: (<i>See</i> Common Shows, Moving Pictures.)	
aldermen have power to prescribe for billiard tables.	32
boatmen.	32
bone boiling.	32
bootblacks.	32
bowling alleys.	32
cabmen.	32
car drivers.	32
cartmen, public.	32
circuses: (<i>See</i> Circuses).	32
dirt carts	32
dogs	32
expressmen: (<i>See</i> Expressmen).	32
farmers to use public markets	62
fat rendering.	32
hackmen.	32
hawkers: (<i>See</i> Peddlers).	32
intelligence office keepers: (<i>See</i> Intelligence Offices).	32
junk dealers: (<i>See</i> Junk Dealers).	32
menageries.	32
noxious business.	32
pawnbrokers	32
peddlers: (<i>See</i> Peddlers).	32
public cartmen	32
secondhand dealers	32
scalpers in coal freights.	32
shooting galleries	32
shows, common.	32
truckmen.	32
vendors.	32
form of, numbering and registry	32
Liens: (<i>See</i> Assessments for Local Improvement, Assessments and Arrears, Streets, Taxes, Water Rents.)	
Local boards and improvements: (<i>See</i> Assessments.)	
districts of, twenty-five.	166
boundaries of	166
powers of.	168, 169

M

Maps and plans:	Page
alteration of by closing streets.	172
on opening streets	278
president of borough to prepare	170
system of triangulation to be completed	170
by engineer of five years' experience.	170
with aid of U. S. coast and geodetic survey	170
primary stations with co-ordinates	171
completion of, to be approved by board of estimate	171
to be filed in certain public offices.	171
when filed, to be final and conclusive.	171
except as to grades of new streets.	171
produced from public offices, presumed legally filed	172
making and completion of, authorized by aldermen	23
Markets:	
department of finance to have control over.	63
establishment of, by aldermen.	23
lands dedicated for market at Gansevoort St.	62
lands for, how acquired by city.	278
proceedings to obtain.	278
license to use, to farmers.	62
permit of stall in, cannot be limited in new permit issued to assignee	62
space under bridge used as, not within jurisdiction of commissioner of bridges	62
sinking fund commissioners, authority over.	62
may lease.	62
Marshals:	
selling under execution, need not be licensed as auctioneers.	20
Mayor:	
appointments and removals by: (<i>See Officers of City.</i>)	
Moving pictures: (<i>See Common Shows.</i>)	
license for operating necessary.	187
by commissioner of water supply, gas and electricity	187
examination of applicant for	188
may be revoked	188
in force one year.	188
removal of.	188
certificate to person operating	188
to be displayed.	188
operating without license, a misdemeanor.	188
Municipal civil service: (<i>See Civil Service, Municipal.</i>)	
Municipal courts:	
districts of, boroughs divided into:	
in Manhattan borough, nine	375
boundaries of	375
Queens borough, four	376
boundaries of	376
justices in office and elected, assigned to districts	371
salaries of.	374
removal of.	380

Municipal courts—Continued	Page
vacancies in	374
clerk and assistant clerks	377
appointed by justices	377, 380
removal of	378
salaries	378
bond of	378
stenographers, interpreters and attendants	378
appointed by justices	378
removal of	378
employees of, not to hold other office	378
removal of	378

N

Navigable waters:	
title of city to, in trust for public	40
authority of city to acquire lands for improvement of	178
New aqueduct:	
commissioners of: (<i>See</i> Water Supply, Gas & Electricity, Department of.)	
Notes of city: (<i>See</i> Bonds.)	
Nuisance: (<i>See</i> Encroachments.)	
Nurses: (<i>See</i> Physicians.)	

O

Ocean parkway, Brooklyn borough:	
use of, restricted by park commissioner	204
Officers of city: (<i>See</i> Civil Service, Municipal.)	
appointment of, by mayor, a discretionary power	41
majority of members of board to constitute a quorum	395
powers of	395
to choose president, treasurer and secretary	395
removal of, by mayor, not reviewable by court	41
not to incur expense without previous appropriation, or in excess of	395
cannot award contracts in excess of appropriation	395
to be represented by corporation counsel	102
head of bureau, when not removable	396
clerks, regular, defined	396
within Civil Service Law	396
removal of, when within competitive class of civil service	397
transfer to another position, not removal	397
reduction of salary, when not removal	397
notice of charges	398
grounds assigned for	398
not reviewable by courts on merits	398
reinstatement by court by mandamus	399
right and remedies of, on abolition of position	400
salary of during period of illegal removal	401
personal liability of head of department for illegal removal	402

Officers of city—Continued	Page
costs of, in defending proceedings for removal, to be audited as charge against city	95
not to hold any other civil office.	404
exceptions	404
vacations of, regulated	406
Ordinances: (<i>See Under Various City Departments.</i>)	
limited by constitution, statutes and reasonableness	21
aldermen, board of, judge of necessity and advisability	21
unreasonable, oppressive, in restraint of trade invalid	21
have the force of law.	21
cannot enforce city contracts by penalties for breach	21
violation of, does not subject wrongdoer to civil liability.	21
evidence of negligence.	21
forbidding theatrical performances not affected by Penal Law	21
judicial notice of, court will not take	21
regulations of municipal explosive commission constitute part of code of	236

P

Parks: (<i>See Parks, Department of.</i>)	
lands for, how acquired by city.	278
procedure to obtain	278
Parks, department of:	
acquisition and establishment of parks by aldermen.	23
park board, head of.	202
commissioners of:	
appointed by mayor	202
one of, president of board.	202
for each borough.	202
salaries of.	202
office, principal, in Manhattan borough.	202
branches in other boroughs.	202
general powers and duties.	202
additional powers of former boards.	205
ordinances restricting use of parks within power of board	202
streets within 350 feet of parks:	
commissioner to regulate curb line, and surface.	202
to ornament with trees, etc.	203
lights.	203
obstructions in, illegal.	203
stands to view parades	203
privileges in buildings in parks:	
for rental; rights of lessees	203
transfer of jurisdiction of certain streets in Brooklyn borough to president of borough.	204
Ocean Boulevard, Brooklyn:	
use of, to be restricted by park commissioners.	204
Broadway, between 59th and 168th Streets, Manhattan:	
care of, including parkways, in charge of commissioner of Manhattan borough.	206

Parks, department of—Continued	Page
annual appropriation for care of plots in	206
no jurisdiction over streets adjoining plots	206
Patented articles:	
exceptions to prohibition of city using patented pavements	405
Pavements: (<i>See Streets.</i>)	
city may contract for patented pavements	405
under what provisions for bids	405
Pawnbrokers: (<i>See Licenses.</i>)	
police supervision over	130
Payments: (<i>See Finance, Department of.</i>)	
Peddlers: (<i>See Licenses.</i>)	
license of, by aldermen	32
right to use streets, in absence of ordinance to contrary	34
ordinance restricting peddling between 5 A. M. and 1 P. M. void	35
rights of veterans as peddlers	35
Physicians:	
employees of city, entitled to treatment at expense of city for illness by contagious disease while in performance of duty	396
Plumbers:	
registration of	155
Police department:	
commissioner of:	
term of office, five years	107
removable, at pleasure, by mayor or governor	107
ineligible for reappointment	107
successor of, appointment and removal of	107
salary of	107
may be increased by board of estimate	108
deputies of, four in number	108
appointed by commissioner	108
act during disability or absence of commissioner	108
powers and duties defined by commissioner	108
salary of	108
furnish station houses	131
power to make rules	109
does not extend to taking photographs of persons charged with crime	109
no summary power to make	111
telegraph operators, when ranking as lieutenants of police	110
telegraph system authorized by ordinance of aldermen	23
force of, composition, members of, enumerated	109
qualification of	110
applicants and appointees, publishing names of	110
promotions regulated	111
for meritorious conduct	112
from grade to grade	113
detective bureau	113
details to, by commissioner	114
grades in, salaries	114
headquarters in boroughs	114
salaries of members of	115

Police department—Continued	Page
charges against members of:	
application for rehearing, waiver of back pay.	403
notice of.	117
procedure on hearing of	118, 119
rehearing of, on allowance by mayor, within one year	403
removal of:	
for insanity	120
legal offenses.	120
conduct unbecoming an officer	120, 123
review of, on certiorari.	123, 125
punishment of.	125
reinstatement of, on rehearing, if dismissal has been illegal or unjust	403
mandamus to reinstate members of:	
limitation to four months.	126, 136
absence without leave of members	126
membership in political club	127
special patrolmen:	
liability of city for arrests of	127
liability of city for acts of members of.	128
traffic regulation by.	128
arrests without leave of members	128, 131
inspection of premises by	129
restraining trespasses by.	129
trades, police supervision over certain	130
licenses by, to steamer and railroad runners, regulated.	131
pension fund of:	
power of commissioner to retire members for disability or old	
age	132
parents, widows and orphans entitled to	132
members of force entitled to:	
superannuated by age.	134, 135
for disability	134, 135
after twenty-five years' service	134
horses of, transfer of; sale and disposal of proceeds of sale.	223
Property of city:	
assent of comptroller necessary to purchase of real estate or easement	
therein by city	57
exchange of lands under water for other lands	96
provided that lands no longer used for public purposes	97
powers of former boards concerning sale or exchange of:	
vested in board of estimate	97
at auction or by sealed bids after notice	405
conditions of sale may provide that buildings sold, shall not be re-erected	
within lines of proposed street or public improvement	405
proceeds of sale to be deposited with chamberlain.	405
Public buildings:	
acquiring and constructing by ordinance of aldermen.	23
and authorize loans on bonds.	23
board of estimate must first approve	23
Public charities, department of: (<i>See</i> Abandonment Proceedings, Ambulance Service, Board of.)	

Public charities, department of—Continued	Page
rules and regulations:	
commissioner to adopt for department and institutions	209
except for certain private institutions	209
to be as far as practicable uniform in all boroughs	209
subordinate officers and assistants:	
appointed by commissioner	209
deputy commissioners and their duties	209
city not liable for tortious acts of officials of	210
children: (<i>See Abandonment Proceedings.</i>)	
commitment of destitute:	
term of	210
to what institutions	210
institutions to report children received and discharged	210
day nurseries for children	214
commissioner of:	
member of board of ambulance service	219
inebriety	215
Public comfort stations:	
construction authorized by ordinance of aldermen	23
injuries sustained in, when city not liable for	32
Public improvements: (<i>See Streets.</i>)	
before one estimated to cost \$50,000 or more is authorized, board of estimate may determine in what proportions expense of same to be borne by city, borough and private person, etc.	99
apportionment of cost of acquisition or physical improvement between city, borough and private persons only after notice and hearing	100
cost of, may be levied with taxes of current or succeeding year	100
assessed upon property benefited	101
assessment for, in certain cases, payable in installments	101
proceedings for, now pending, reconsideration of by board of estimate	101
cost of, defrayed by money borrowed on certificates of indebtedness	102
Public recreation commission:	
membership of, how constituted	206
appointed by mayor	206
president and secretary of	207
employees of	207
powers of:	
over playgrounds and recreational properties	207
to acquire property for playgrounds by lease, gift or purchase	207
no expenditure by, without consent of board of estimate	207
temporary use of property assigned by sinking fund commissioner	207

R

Railroad runners: (<i>See Licenses.</i>)	
license by police department regulated	131
Rapid transit acts:	
not affected by provisions of charter	22
rate of interest on bonds for construction to be fixed by sinking fund	22
estimate board to have power under	22

Rapid transit acts—Continued

- corporate stock upon contracts under. 22
- contracts under, to be certified by comptroller. 22

Real estate: (*See* Property of City.)

Records, public:

- when taxpayer not entitled to general inspection of health department records 403
- not entitled to inspection of records of investigation of commissioner of accounts. 403
- entitled to inspection of engineers' report of board of water supply. 404

Recreation piers: (*See* Docks.)Revenue bonds: (*See* Bonds.)

Riparian rights:

- upland owner not deprived of, by public street 41

S

Salaries: (*See* Civil Service, Municipal.)

- board of aldermen fix. 36
- power does not authorize creation of new positions. 36
- power limited to certain employees. 36
- after adoption of annual budget, salaries only fixed by transfer of appropriations. 36
- not reduced by employee receiving less sum. 37
- labor law forbids recovery for more than eight hours' work daily. 37
- increased, by transfer of employee when not recoverable. 37
- how drawn, prescribed by department of finance. 55
- paid upon payrolls by warrant. 56
- cannot be audited by head of department. 58
- effect on, of annual budget. 92
- payment of, for positions created after annual budget. 93

Schoolhouses: (*See* Buildings, Education, Department of, Public Buildings.)

Sewers:

- defective sewerage and drainage, liability of city for. 145
- when dependent on notice 147
- drains, liability of city for failure of plan for 141
- drainage plan:
 - upon completion and approval by board of estimate, to be final. . . 173
 - to be filed in certain public offices. 173
 - subject to change by alteration of grade of streets. 174

Sheds on piers: (*See* Docks.)Show windows: (*See* Encroachments.)Shows: (*See* Common Shows.)Sidewalks: (*See* Encroachments, Streets.)

- liability of city for defective. 142
- obstructions on. 144
- sheds over, during construction of buildings. 154

Signs:

- power to regulate use on streets by ordinance 24
- buildings governed by Building Code. 24

Signs—Continued	Page
on walls of buildings, not within Building Code.	24
sides of temporary shed over sidewalk, illegal.	131
ordinance regulating use of, on wagons, valid.	31
prohibiting general advertising on, within power of aldermen. . . .	31
sky signs, bill boards and commercial signs not within Building Code. 156,	157
permit for	156
Sinking fund:	
commissioners of:	
authority over market in Gansevoort St..	62
may lease land for use of markets.	62
sale or lease of city property at auction.	81, 85
limitation as to markets	81
assign city property for public use	81
proceeds of sale to go into sinking fund.	81
power to settle disputes with private owners by mutual conveyances	81
approve agreements establishing high water line.	81
sell interest in lands of closed streets	82, 85
direct demolition of buildings acquired by city	82
agree with owners of building on cost prior to vesting title	82
purchase buildings or award for same, at private sale.	82
lease lands acquired for protection of water supply.	83
condition of, prescribed.	83
assign place for holding courts and jails.	84
cancel bonds in sinking fund of municipalities consolidated. . . .	83
indebtedness of city for supply of water	84
prescribe rate of interest on bond and stock.	65, 84
cancel taxes, assessments and water rents	88
exchange lands no longer used for public purposes for other	
lands.	86
subject to approval of board of estimate.	86
on valuation by appraisers.	86
for redemption of city debt:	
replenished by amount in annual budget needed to meet stocks	
and bonds payable.	87
deductions from same	87
bonded debt:	
redeemed by commissioners of sinking fund	88
consolidated stock:	
purpose of	88
charge on sinking fund	88
general fund bonds:	
to be issued to sinking fund for redemption of city debt	89
cover excess of annual revenues needed for annual redemption	
of city debt	89
excess to be invested in.	90
to be issued by comptroller upon receipt of excess when paid	
into treasury.	90
cancelled when bonds for city debt paid	90
sale of, under what conditions.	91
Steamer runners: (See Licenses.)	
licenses by police department regulated.	131

Street cleaning, department of:

commissioner of:	Page
devolution of former boards of	194
jurisdiction of, in boroughs as to sweeping, etc., of streets and disposal of ashes and garbage.	188
districts by division of streets	191
allotment of sweepers to.	191
employees of, acts of, city not liable for.	189
engineers:	
chief and assistant appointed and removed by head of department.	174
qualifications of.	174
may be appointed deputy commissioner	174
horses of, transfer of, sale and disposal of proceeds of sale.	223
lease:	
of stables and buildings for ten years.	193
construction of	193
plant, supplies, etc.:	
commissioner to purchase or hire	192
to contract for construction of.	192
to sell at auction unused.	192
contracts for, over \$1,000 to be on public bids.	192
except emergency agreement of hire of horses, vessels, etc., for successive trips.	192
relief and pension fund:	
clerical and uniformed force entitled to	195
consists of:	
three per cent of weekly pay of employees	195
deductions from salaries	195
moneys for scow trimming at dumps	195
proceeds of sales of ashes, garbage, etc.	195
condemned property	196
balance of salaries unexpended	196
gifts and bequests	196
commissioner, trustee and treasurer of.	196
duties of.	196
bond of.	196
rules by, regulating pensions	199
annual report to mayor.	197
auditing committee	197
authorized to take gifts for fund.	197
pensions from, upon retirement, classified.	197
term of service entitling to pension.	198
pension moneys exempt from execution.	199
when fund to come into existence.	200
not payments out of, until January 1, 1912.	200
street flushing:	
contracts for, by commissioner	193
water for, to be furnished by department of water supply.	193
special revenue bonds to provide expense of.	193
uniformed force:	
removal of, procedure on	189

Street cleaning, department of—Continued	Page
review of, by courts.	190
salary during absence or removal	190
Street railways: (<i>See</i> Rapid Transit Acts.)	
for private use for express purposes, forbidden.	96
franchise granted by board of estimate, and not aldermen.	38
transfer of power to grant franchise to board of estimate from aldermen, constitutional	38
license contrary to state statute, forbidden.	31
fee, ordinance imposing penalty for failure to pay, invalid.	31
nothing in charter to affect Rapid Transit Acts.	22
required to keep space between tracks in repair.	144
Streets: (<i>See</i> Signs.)	
closing of:	
provisions of statute of 1895 governing	319
effect of statute on public and private easements	320
legal discontinuance upon filing of map.	320
exceptions to rule.	320
claim for damages, filing of, with comptroller.	321
compelling corporation counsel to institute proceedings	322
conveyance by city of lands embraced within closed streets	326
proceedings on:	
jurisdiction of commissioners.	322
amendment of.	323
damages on:	
principles employed in estimating award for payment of	324
interest on.	324
effect on, of transfer of property pending proceedings.	325
right of former owner to reoccupy on closing of.	325
board of estimate empowered by legislature	172
action not subject of review.	172
has power to, without action of local board	172
has no power to discontinue proceedings for, after damages reported.	172
power not affected by § 990,	172
to close without compensation to adjoining owners.	173
defective, liability of city for	142
encroachments in	144
accumulation of ice and snow in	146
when dependent on notice	147
for negligence of contractor causing defects in	148
for negligence of licensee of street.	148
as affected by negligence of person using.	149
encroachments upon: (<i>See</i> Encroachments.)	
fund for street and park openings:	
continued.	68
consists of cash balances on deposit January 1, 1898	68
sums raised by taxation	68
assessments collected.	68
proceeds of sale of assessment bonds issued under § 174.	69, 70
replenishment of:	
by issue of certificates of indebtedness.	70

Streets—Continued	Page
out of sum included in budget.	70
damages for street and park openings, paid out of	69
claimant may compel raising of money to pay.	69
grade, change of: (<i>See</i> Grade of Street, Change of.)	
grading streets with material excavated on making other public improve- ments	276
opening of:	
land to be acquired by board of estimate.	278, 279
change of map and procedure	279, 280
compensation for, in excess of benefit.	279, 280
petition to Supreme Court	279
in judicial department lands situated.	279
contiguous portions may be in one petition.	279
single proceedings for, although contiguous premises situate in two boroughs	279
awards for, payable on confirmation of commissioners' report.	280
payable only after thirty days' notice to comptroller	58
to unknown owners	304, 306
to executors and administrator.	299
partners	299
vendee on executory contract of sale	300
mortgagee	300
transferee <i>pendente lite</i>	300
interest on, when begins to run	312, 316, 319
city entitled to, for its lands taken.	314
set-offs against	315
payment of, proceedings to compel.	317
commissioners of estimate and of assessment:	
nature of application for.	279
by publication and posting.	281
requirements of.	281
three appointed, of which one, commissioner of assessment.	281
qualifications of	281, 282
challenges, and how disposed of.	282
order for, owner by moving to vacate, may attack right of city to take lands	282
powers and duties of	283
to administer oaths	283
to open defaults	283
examination of witnesses.	283, 288
surveys and maps.	283
to be furnished by departments.	284
or in default, by corporation counsel	284
to estimate damages and benefit.	285
assessments:	
commissioners to make	285
limited to area fixed by board of estimate.	285, 288
division of area of, into zones, by board	285
alteration of area of, by board.	285
area only fixed, after notice and hearing by board.	286

Streets—Continued	Page
proportion to be borne by city at large, or any borough fixed by board	286, 288
when fixed, to be final	287
expenses of maps, when included in	286
not to exceed one-half of value of house and lot	287, 297
may be limited to part of building, not exceeding one-third	287
consequential damage to buildings not taken	287, 291
to land not taken	291
value of land in, how determined	289
buildings, how fixed	290
easements, allowance to abutting owner	292
effect of dedication of street by owner	293
landlord and tenant, different interests in land taken for, how determined	294
cemetery lands taken for, value of	296
value of land taken for, weight of expert evidence	296
benefits, principles employed in assessing	296
exemptions from assessments for benefit of cemetery lands	298, 319
railroad property	298
abstract of estimate of damages and assessment for benefit to be deposited	301
abstracts and proofs also to be deposited	302
report of commissioners:	
minority report not before court	307
notice to file objections to, given by publication	302
objections to estimate and assessment, how presented and de- termined	302, 303
contents of, with abstract of damage and benefit	303
as to unknown owners	304
to include specification of estimates	307
partial reports, when authorized by board of estimate	305, 306
confirmation, questions reviewable on	306, 307
only objections presented on filing preliminary abstract	306
rulings on evidence when reviewable	308
review of values	308
return of, by court for revision	310
power of court to amend or modify	310
appeals from order of confirmation	311
title to land taken for:	
when vests in city, where there are buildings on	312
what necessary to vesting	312
by conveyance to city by owner of land required for:	
upon record of conveyance, title vests	314
after conveyance, no proceedings allowable to open street	314
costs and charges in proceedings for	314
discontinuance of proceedings	315
pavements: (<i>See Assessment for Local Improvements.</i>)	
repaving by ordinance of aldermen	23
permits for opening	151
materials for, classified	274
class A, asphalt, block, etc.	274

Streets—Continued	Page
class B, bituminous macadam	274
on repavement to be of class A.	274
assessment for.	274
temporary, power to construct.	275
Street improvement fund:	
replenishment of, continued.	73
sale of assessment bonds, paid into.	73
Structures: (See Buildings.)	
Subways:	
permit not necessary from president of borough to open streets for construction of subway.	151

T

Taxes: (See Assessment and Arrears.)	
amount necessary to be raised for city purposes, to be transmitted by comptroller	265
annual record of assessed values:	
books in each borough office	258
requirements of, specified	258
open for public inspection during stated period	259
taxable values fixed as of certain date each year	259
power of tax commissioners to correct and add to.	259, 261
to be furnished supervisor of City Record.	269
how to be entered as to personal property.	260
omission of name of right owner in, does not make tax on real estate void.	260
transfer of, from books of one borough to another.	260
effect of omitting name of owner.	261
apportionment of on real estate.	259
notice of, to be mailed to owners.	260
upon request of comptroller.	272
arrears of, receiver to return to collector of assessment and arrears.	329
assessment of property by deputy commissioners.	257
detailed statement of improvements, names of owners, etc.	257
sum for which real estate would sell with and without improvements	257
of property held for park purposes, not to be made.	257
no deductions for mortgages or assessment.	257
of bank stock governed by Tax Law (L. 1909, ch. 62)	258
special franchises not assessable by local assessors.	258
assessment rolls:	
when and how prepared	268
certified to board of aldermen	268
contain column headed "arrears" referring to unpaid taxes, etc.	330
aldermen to meet to receive same.	269
taxes thereon to be computed and extended by aldermen	269
unpaid water rents to be entered by comptroller.	270
to be added to and collected with taxes.	330
to be delivered with warrants to receiver of taxes for collection	270
bill for, to contain column of "arrears"	331

Taxes—Continued	Page
have notice of sale of liens for taxes unpaid for three years . . .	331
of arrears to be furnished by collector	345
receipt by collector, when to be conclusive evidence.	345
collection of:	
warrants authorizing receiver of taxes to be signed, etc..	270
delivery of assessment rolls to receiver of taxes	270
when to pay by advertisement.	270
personal property taxes on May 1.	270
real estate taxes payable one-half May 1, balance November 1. . . .	271
rebate for payment before November 1.	271
on personal property by suit by corporation counsel.	272
correction, remission and reduction of.	261, 263
application by aggrieved party for, in writing	262
commissioners to examine into complaint	262
duties of deputy commissioners in each borough	263
applicant for, to be examined under oath	262
testimony to be taken in writing.	262
to be made and entered upon assessment rolls	262
decision of commissioners, time limit of.	264
when assessed values may be diminished or increased.	262
notice to owner of property, when required.	262
certiorari from Supreme Court.	266
grounds for, illegality or inequality.	266
time limit of	267
does not authorize increase of values	267
petition for, requisites of.	267
equalization of, between boroughs:	
board to direct deputies	265
deputies to transmit borough aggregates to main office	265
board to equalize valuations.	265
exempted lands, cancellation of taxes on, by sinking fund.	88
interest on:	
on one-half of real estate unpaid after June 1.	271
remaining half after December 1.	271
rate, seven per cent.	271, 272
reduction of, below rate fixed by law, forbidden.	58
rate to be fixed in cents and hundredths of a cent.	269
undivided parts of taxes:	
division of, by comptroller	272
apportionment for purpose of.	272
Taxicabs:	
ordinance discriminating against, without meters, invalid	35
stands for: (<i>See</i> Encroachments.)	
Telephone companies: (<i>See</i> Franchises.)	
Tenement house, department:	
employees, absence on sick leave.	370
removal of.	370
salaries of, in charge of finance department.	371
violations of, foreclosure of mortgage on land extinguishes	371
Theaters:	
aisles and passageways in, to be kept clear.	229

Theaters—Continued	Page
built according to Building Code	155
dancing and singing in restaurant require no license	388
exhibitions on Sunday prohibited	391
licenses for, in Borough of Richmond by police department	389
granting of, discretionary	389
commutation of license fee	390
revocation of, for violation of law	390
licensee's rights as proprietor of a private business	389
moving picture show without fee in ice cream saloon requires no license	288
Theater ticket speculators:	
ordinance forbidding sale by, in streets, valid	35
sale of tickets is not hawking or peddling with meaning of § 51	35
Tunnels:	
building of, by ordinance of aldermen	23

U

Unsafe buildings: (*See Buildings.*)

V

Vaults:	
license fee for use of, authorized	25
permits for, subject to rights of public service corporation	25
retaining wall of, removable by city for public improvement	25
right to maintain tunnel under street between two buildings	39
Vessels: (<i>See Docks, Street Cleaning, Department of.</i>)	
building; repairing or equipping by ordinance of aldermen	23
and authorize lands on bonds	23
board of estimate must first approve	23

W

Walls: (<i>See Encroachments.</i>)	
Warrants: (<i>See Comptroller, Finance, Department of.</i>)	
Water front: (<i>See Docks.</i>)	
Water grants:	
restricted to within exterior lines of city as fixed by statute	256
city may convey dock lands and lands under water for canal terminals	256
Water rents:	
aldermen establish scale of	175
on recommendation of commissioner of water supply, gas and electricity	175
cannot relegate power to fix	177
apportioned to different classes of buildings	175
extra charges included with regular rents	176
lien on buildings and lots	176, 177
penalty for waste of water added to water rents	328

Water rents—Continued	Page
no-regular charge for, where water meters installed.	176
payment of, constitutes no contract preventing installation of water meter	176
exemptions of hospitals and charitable institutions from	177
interest seven per cent in arrears	328
arrears of, to be transmitted to comptroller	329
due to overcharges, remitted by comptroller.	329
meters:	
determine quality of water used	176
controlled by commissioner of water supply, gas and electricity	178
placed where water is used for business consumption	178
charges for water, when meter out of repair	178
expenses for setting and water supplied through, lien on premises	178, 180
collected, to be applied to procuring and setting	179
incorrect registration of.	179
liability for, between landlord and tenant.	180
liens preferred in payment, with taxes and assessments to all other charges.	326
includes expenses of water meters and water supply through them	327
in buildings completed after May 1, when becomes lien.	327
Water supply: (See Water Supply, Additional, Water Supply, Gas & Electricity, Department of, Water Rents.)	
maintenance of, a governmental agency:	
city not liable because water is not pure or wholesome.	181
assessment on lands used for reservoirs	181
commissioner of water supply to prepare maps of real estate taken for.	182
public hearing before final adoption of maps	182
maps of real estate taken for, cannot be changed after adoption without authority of board of estimate.	182
awards for damages to owners of lands taken for.	183
appeals from report of commissioners of condemnation	184
agreements with owners of lands taken for	184
mains for, cannot be laid underground without consent of local authorities.	184
Water supply, additional (L. 1905, ch. 724):	
additional water supply for city provided	417
board of water supply for city, created	417
appointment of, by mayor	417
terms and qualifications	417
organization of board	417
engineers and employees of.	417
contracts:	
work to be done under	438
exceptions	438
specifications for work and materials by board of water supply	434
form of, to be approved by corporation counsel.	434
bids for:	
advertisement for.	434
to be sealed and accompanied by deposit	434
deposit upon	435
opening of	435

Water supply, additional—Continued	Page
rejection of any and all.	435
re-advertisement for.	435
on abandonment of work by contractor.	435
acceptance of bid in discretion of the board.	435
deposits to be returned to unsuccessful bidders.	435
deposit forfeited if successful bidder fails to execute contract.	435
execution of, by board and contractor.	435
work and materials under supervision of board and its engineers.	436
bond of indemnity against paupers or indigent employees to be given before contract shall take effect.	436
expenses for:	
to be defrayed out of corporate stock issued by comptroller.	437
highways and bridges:	
made necessary by construction of reservoir, to be built by city.	438, 446
investigation of sources of additional water supply.	418
duties of board.	418
surveys, maps, plans, etc., of sources.	418
report to board of estimate.	418
modification or rejection of.	418
maps and plans of.	419
execution and filing of.	419
may be filed in sections.	420
where to be filed.	421
must be submitted to and approved by state water supply commissioner.	444
real estate to be taken for, defined.	432
includes liens of mortgages, judgments, etc.	433
includes railroads, highways, etc.	433
substitution of other public land for that used by railroad, highway, etc., for water supply.	433
change of route:	
of railroad, public highway, etc.:	
by board of water supply.	433
confirmation by Supreme Court.	433
award for expense of.	433
consequential damage to private property to be compensated.	442, 447
commissioners of appraisal:	
application for appointment of.	421
petition to Supreme Court with maps.	421
hearing of, by Appellate Division and Court of Appeals.	430
papers on appeal to be furnished by city.	430
reappraisal on.	431
lands and water; entry on, to make surveys, etc..	420
police protection:	
duty of board to provide to inhabitants while work is under construction.	439
appointments by board, of police officers.	439
powers of, to arrest, etc..	439
pollution:	
protection of streams from, by city.	440

Water supply, additional—Continued	Page
compensation to owners of buildings, etc., removed or destroyed...	440
lakes, right of public to fish or cut ice from	441
use of, by municipal corporations of Westchester County under certain conditions	441, 446
use of, by other municipal corporations	441
regulated and compensation therefor	441
title of city to lands:	
buildings and improvements not to be disturbed until one year after oath, unless thirty days' previous notice	445
on filing of oath	423
possession by city without suit or proceeding at law	423
payment to owner of one-half of assessed valuation before possession by city	423
acquisition of, by agreement with owner	432
grants by commissioners of land office	432
awards, payment on	428
interest on	428
suit to recover	428
to minors and incompetent persons	428
protection of city on payment to persons named in report	430
claims for compensation; when to be presented	429
within three years of appointment of commissioners	429
when deemed abandoned	429
Water supply, gas and electricity, department of:	
commissioner of:	
powers do not extend to lighting public schools	174
may contract with water supply companies for public buildings, stables, etc.	174
licenses moving picture shows: (<i>See Moving Pictures</i>)	187
former employees of waterworks companies assumed by city, to be retained	175
after passing civil service examination	175
new aqueduct, commissioners of, succeeded by commissioner of water supply, gas and electricity	185
former employees of aqueduct commissioner transferred to department of water supply, gas and electricity, after passing civil service examination	185
Water supply companies: (<i>See Franchises.</i>)	
Wharves: (<i>See Docks.</i>)	
Wharfage rights: (<i>See Docks.</i>)	
Wives, abandoned: (<i>See Abandonment Proceedings.</i>)	
Work and supplies: (<i>See Contracts.</i>)	
involving an amount for which no contract is required, not to be made, except necessity therefor certified by head of department	160

E. G. M.
7/25/17

